Petition

81-1919

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1981

RALPH GROUNDS, ET AL. (Landowners Group),
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.
(Lessee-Producer Group),

AND

NORTHERN NATURAL GAS COMPANY, ET AL.
(Helex Group),

AND

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether The Court Below Has Decided, In A Manner Directly In Conflict With The Decision Of This Court In *Phillips Petroleum Company v. Texaco, Inc.*, 415 U.S. 125, The Claims Of Landowners, As Lessors Under Oil And Gas Leases, For A Reasonable Royalty Based Upon The Value Of Helium Unwittingly Produced By Their Lessees As A Consequence Of Operations Under Conventional Oil And Gas Leases?

II

Whether By Purportedly Deciding Such Claims, Potentially Involving Hundreds Of Millions Of Dollars, On Occasions When The Issue And The Necessary Parties Were Not, And Could Not Have Been, Present, The Court Below So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For Exercise Of This Court's Power Of Supervision?

PARTIES TO THE PROCEEDING

A. Petitioners Ralph Grounds, et al. (Landowners Group).

Petitioners, Ralph Grounds, et al., and Oliver S. Brown, et al.; O. W. Hegler, et al. and Oliver S. Brown, et al.; Vivian Shuett, et al., J. W. Teater, The Federal Land Bank of Wichita, Marion S. Maser, Marion S. Pfeiffer, Guy T. Miller, and Oliver S. Brown, et al.; Katherine R. Adams, et al., and Oliver S. Brown, et al.; Bloyd Burgess, et al., and Oliver S. Brown, et al.; and Ralph Grounds, et al., and Oliver S. Brown, et al.; and others whose hundreds of names are included in a list set forth in Appendix (App. p. A660). In these consolidated proceedings they variously appear individually and as representatives of three defendant classes comprised of:

(a) ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium is being or will be taken into the possession by the United States of America in Ellsworth County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Northern Helex Company (formerly Helex, Inc.) dated August 15, 1961."

(b) ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken into possession by the United States of America in Grant County, Kansas, at

the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Cities Service Helex, Inc., dated August 22, 1961."

(c) ". . . the persons, firms and corporations owning a mineral interest in land from which the helium has been, is being, or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken into possession by the United States of America in Seward County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader National Helium Corporation, dated October 13, 1961."

B. Respondents Mobil Oil Corporation (formerly Socony Mobil Oil Company), et al. (Lessee-Producer Group).

(a) Ashland Oil, Inc. (formerly Ashland Oil & Refinery Company), Cities Service Company (formerly Cities Service Oil Company), Gulf Oil Corporation, Helmerick & Payne, Inc., Mapco Production Company (successor to Hugoton Plains Gas and Oil Company), Mobil Oil Corporation (formerly Socony Mobil Oil Company), Texaco, Inc., and Phillips Petroleum Company, appearing individually and as representatives of a class of Lessee-Producers defendants described as:

". . . the persons, firms and corporations denominated 'lessee-producers' who are the owners of leasehold interests in the oil and gas leases from which gas is produced for delivery to Northern Natural Gas Company and who deliver, have delivered or will deliver helium contained in gase-

ous streams directly or indirectly to Northern Natural Gas Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader Northern Helex Company, into the possession of the United States of America at the delivery point described in that certain contract between the United States and Northern Helex Company (formerly Helex, Inc.) dated August 15, 1961."

Atlantic Richfield Company is also a named defendant which is a member of this class.

(b) Mobil Oil Corporation, Ashland Oil, Inc., Cities Service Company (formerly Columbian Fuel Corporation and Cities Service Oil Company) and Amoco Production Company (formerly Pan American Petroleum Corporation), appearing individually and as representatives of a class of Lessee-Producer defendants described as:

". . . the persons, firms and corporations denominated 'lessee-producers' who are the owners of leasehold interests in oil and gas leases productive of helium-bearing natural gas and who deliver, have delivered or will deliver helium contained in such gaseous streams directly or indirectly to Cities Service Gas Company, which helium has been, is being, and will be removed and delivered by plaintiff in interpleader, Cities Service Helex, Inc., into the possession of the United States of America at the delivery point described in that certain contract between the United States of America and Cities Service Helex, Inc., dated August 22, 1961."

(c) Ashland, Oil, Inc. (formerly Ashland Oil & Refinery Company), Cities Service Company (formerly Columbian Fuel Corporation), Gulf Oil Cor-

poration, Helmerick & Payne, Inc., Mobil Oil Corporation, Amoco Production Company (formerly Pan American Petroleum Corporation), Diamond Shamrock Corporation (successor to the Shamrock Oil and Gas Company), Texaco, Inc., Dorchester Gas Producing Company, and the Superior Oil Company, appearing individually and as representatives of a class of Lessee-Producers defendants described as:

"... the persons, firms and corporations denominated 'lessee-producers,' who are the owners of leasehold interests in the oil and gas leases (from which gas is produced for delivery to Panhandle Eastern Pipe Line Company) and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Panhandle Eastern Pipe Line Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader National Helium Corporation into the possession of the United States of America at the delivery point described in that certain contract between the United States and National Helium Corporation dated October 13, 1961."

C. Respondents Northern Natural Gas Company, et al. (Helex Group).

(a) Northern Natural Gas Company, Northern Helex Company and Northern Gas Products Co.

(b) Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.

(c) National Helium Corp. and Panhandle Eastern Pipe Line Company.

D. Respondent United States of America (Intervenor).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

Petitioners, described by the courts below as landowner-lessors, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Tenth Circuit Court of Appeals reported as *Northern Natural Gas Co. v. Grounds,* 666 F.2d 1279 (10th Cir. 1981). (App. p. A1) Previous opinions below in these six consolidated cases, described by courts below as the *Consolidated Helium Cases,* appear in the Appendix separately presented. The initial unpublished 1963 opinion of the United States District Court for the District of Kansas is set forth in the

Appendix. (App. p. A311) Other opinions, in chronological sequence, appear in the Appendix and are also reported as *Grounds v. Northern Natural Gas Co.*, 327 F.2d 1003 (10th Cir. 1964); *on remand*, 292 F. Supp. 619 (D. Kan. 1968); *aff'd in part and remanded*, 441 F.2d 704 (10th Cir. 1971); *cert. denied, Grounds v. Northern Natural Gas Co.*, 404 U.S. 951 (1971); *cert. denied, Northern Natural Gas Co. v. Mobil Oil Corp.*, 404 U.S. 1063 (1972); *cert. denied, Panhandle Eastern Pipeline Co. v. Mobil Oil Corp.*, 404 U.S. 1063 (1972); *reh. denied, Grounds v. Northern Natural Gas Co.*, 404 U.S. 1065 (1972); *on remand*, 393 F. Supp. 949 (D. Kan. 1974).

The court below purported to pass upon petitioners' claims asserted in the above *Consolidated Helium Cases* in the course of another series of opinions. It did so although neither petitioners nor any other landowner-lessors were parties to that series of opinions. Those opinions also appear in the Appendix. In chronological sequence, these opinions are reported as *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 364 F. Supp. 6 (N.D. Okla. 1973); *aff'd in part, rev'd in part and remanded*, 554 F.2d 381 (10th Cir. 1977); *cert. denied, Phillips Petroleum Co. v. Ashland Oil, Inc.*, 434 U.S. 921 (1977); *reh. denied*, 434 U.S. 977; *cert. denied, United States v. Ashland Oil, Inc.*, 434 U.S. 968 (1977); *on remand, Ashland Oil, Inc. v. Phillips Petroleum Co.*, 463 F. Supp. 619 (N.D. Okla. 1978); *aff'd in part, rev'd in part and remanded*, 607 F.2d 335 (10th Cir. 1979); *cert. denied, Ashland Oil, Inc. v. Phillips Petroleum Co.*, 446 U.S. 936 (1980); *cert. denied, Phillips Petroleum Co. v. Ashland Oil, Inc.*, 446 U.S. 936 (1980). On remand, the District Court in 1980 modified the judgment in an unreported order (App. p. A492) and in 1981 entered an unreported Order of Clarification (App. p. A490); *aff'd Ashland Oil, Inc. v. Phillips Petroleum Corporation*, No. 81-1159 (10th Cir. Feb. 10, 1982).

JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed is November 16, 1981, and it was entered that day. Timely petitions for rehearing were denied on January 19, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1, United States Constitution, provides in pertinent part:

> "The judicial Power of the United States, shall be invested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 2, United States Constitution, provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . to Controversies . . . between Citizens of different States, . . ."

Fifth Amendment, United States Constitution, provides in pertinent part:

> "No person shall . . . be deprived of . . . property, without due process of law."

STATEMENT OF THE CASE

Material Facts

These *Consolidated Helium Cases,* brought in 1962 in the United States District Court for District of Kansas, have been maintained as actions in the nature of interpleader by three groups of helium extraction companies or their pipeline affiliates, described collectively as the Helex group. The Helex group sought judicial determination of the rights to the helium or funds paid, and to be paid, to members of the Helex group by the United States Government for the delivery of helium, carried by natural gas streams originating from thousands of wells, productive of natural gas, located in Texas, Oklahoma and Kansas. The Helex group removed the helium from those natural gas streams in their respective plants straddling their respective three pipeline systems into which the helium-bearing natural gas was gathered and contained.

The natural gas streams came from lands owned by that defendant class, denominated below as landowner-lessors, petitioners herein. Before the commencement of natural gas production or the later removal of the helium from the produced streams, the landowners-lessors or their predecessors in interest, had executed conventional oil and gas leases, as lessors, to certain lessees. Those lessees, or their successors in interest, constitute a class denominated below as lessee-producers. Those oil and gas leases conferred upon the lessees a license to explore for, produce and market gas in exchange for rental, commonly called royalty, computed on the basis of the value of the gas produced. The lessee-producers, including one pipeline in its capacity as lessee, delivered the produced streams into the pipelines of the affiliated pipeline members of the Helex group.

The affiliated members of the Helex group who removed the helium in the plants were spawned by the pipeline members of the Helex group in response to the government's election to make massive purchases of helium pursuant to congressional authorization embodied in the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. §167 *et seq.* In accordance therewith, the Secretary of the Interior entered into contracts with each of the three newly spawned pipeline affiliates providing for the construction of a plant for the removal of a raw and inert helium-nitrogen mixture from the helium-bearing natural gas streams and for delivery of the mixture into a government pipeline leading to the government's own storage and helium removal facilities. This arrangement made it possible for the government to sell pure helium, so derived, for its many ultimate beneficial uses, and for the pipelines to continue to sell the combustible natural gas, now free of such non-combustible inerts, to their existing energy markets.

Contentions Of The Parties And Jurisdictional Determination

In these *Consolidated Helium Cases,* the interpleader Helex plaintiffs generally contended, in effect, that the landowner-lessors, in previously filed state court actions, were wrongfully making claims relative to the helium removed by the Helex companies or their affiliates and delivered to the government. The Helex plaintiffs also generally claimed that they or their affiliates had title to the helium through transfer to them (1) under oil and gas leases, executed by the landowner-lessors to the lessee-producers, and (2) under gas purchase contracts executed between the lessee-producers and the Helex pipeline affiliates pursuant to which the helium-bearing natural gas streams were delivered to the Helex groups. (App. p. A172)

They also asserted indemnity claims against the lessee-producers based upon warranty provisions contained in gas purchase contracts. (App. p. A204) The lessee-producers then asserted claims against the Helex group for the helium or its value. The federal district court found interpleader jurisdiction to exist on each case under 28 U.S.C. §1335. It also restrained landowner-lessors from instituting or pursuing proceedings in state court. (App. p. A384) On an interlocutory appeal, this jurisdictional determination was affirmed in 1964 by the Tenth Circuit Court of Appeals. (App. p. A309)

The Initial Trial On The Merits And Resulting Appeal

The initial trial before the federal district court resulted in a complete victory for the Helex group. The trial judge held that neither the landowner-lessors nor the lessee-producers had any claim to the helium fund. (App. p. A301) While finding that "gas", as used in the oil and gas leases did not connote helium to the average landowner and that no landowner-lessor specifically contemplated helium in granting rights to produce "gas" (App. p. A252), the trial court, nevertheless, concluded that granting clauses of the oil and gas leases embraced the entire gaseous stream (which necessarily had to be produced at the well in its entirety) (App. pp A262-3), even though helium had been treated as a minute diluent of the natural gas streams until helium became of national importance and therefore economically useful. Likewise, the trial court held that the lessee-producers had transferred their rights to helium by warranting title to the "gas" sold by them to the pipeline companies (App. pp. A269, A291), even though the presence of helium actually diluted the energy content of the natural gas streams, thereby leading to a downward price adjustment under the gas purchase contracts.

On appeal, the court of appeals agreed with the trial judge that the granting clauses in the oil and gas leases embraced helium, notwithstanding that the lessors, when they executed the oil and gas leases, had no knowledge of, or specific intent with respect to, helium. The appellate court, however, reversed the trial court's holding that the gas purchase contracts provided payment for the removed helium as a separate, valuable constituent of the gas streams. The court of appeals ordered that the district court determine the reasonable value of the helium removed from the gas streams and that such value be paid to the lessee-producers, who were also ordered to pay "royalty thereon" to the landowner-lessors. (App. p. A168) Rehearings sought by the Helex group were denied, as were petitions for writs of certiorari to this Court. 404 U.S. 951 (1971); *reh. denied*, 404 U.S. 1065 (1972); 404 U.S. 1063 (1972).

The Second Trial And Resulting Appeal

On remand from the court of appeals, the district court found the reasonable value of the helium to range from 60 cents to 70 cents per mcf of helium removed from 1961 through 1972, the period of time in issue. (App. p. A105) Then, for the first time, it addressed the amount of royalty payable to landowners-lessors, and found as follows:

"*Royalty Payments.*

"In its prior opinion, the Court discussed the oil and gas leases pertinent to this controversy. At the time they were executed, both the landowners and the producers were equally ignorant of the presence of helium in natural gas.

"The gas royalty percentages in the leases arose out of the economics of ordinary natural gas operations, and reflect historical costs and returns, including a consideration of values of natural gas used principally as a fuel. Royalties under oil and gas leases vary according to the risk assumed, and rewards to be expected by the lessee. The evidence shows that nationwide royalty rates vary from 10% to 95%, based upon the expectations and bargaining power of the parties involved. In the Hugoton Field, royalty rates have gone as high as 9/16ths. [Keplinger 9:984-993]

"In the Pinta Dome Field in Arizona, the United States, occupying the position of a knowledgeable landowner, obtained a royalty of 60% on gas useful only for helium. [Keplinger 9:984]

"The helium wellhead values which the Court has here established are attributable to two factors: 1) the existence of underground deposits of helium, and 2) the leasehold production. The landowners have contributed the helium in the deposit, and the producers have contributed their efforts in producing the commodity as a part of the natural gas stream. The helium involved in this litigation became available as a valuable commodity only as a result of the two factors—the existence of the helium deposits, and the producer's reduction of the deposit to possession.

"In the absence of any evidence indicating that there were appreciable additional producer costs attributable to the value of the helium here involved, the Court determines that a royalty of 50% is a reasonable measure of the respective contribution of the landowners-lessors in these actions.

> "In any event, a helium royalty of 50% is fair and reasonable under all of the circumstances, and the Court finds that such royalty is necessary and sufficient to prevent undue enrichment of Lessee-Producers upon distribution of the fund representing the reasonable value of commingled helium which was extracted and sold to the United States by the Helex companies in these actions." (App. pp. A118-119)

The district court's determinations, relative to the value of helium, were appealed by the landowner-lessors and the lessee-producers. The lessee-producers also appealed the 50% royalty determination. (The court below, however, has never considered or reviewed the above-quoted findings and conclusions which established the 50% royalty determination. This failure, as more fully discussed below, forms the basis of petitioners' present request for review of that decision.)

Although the appeals were argued and submitted to the Court of Appeals in 1976, no decision was forthcoming for five years, until November 16, 1981, apparently because of the existence of proceedings in *Ashland Oil, Inc. v. Phillips Petroleum Co.*, initially reported at 364 F. Supp. 6 (N.D. Okla. 1973). (App. p. A468) During the five year period aforesaid, petitioners unsuccessfully urged the Court to certify to state courts the determination of the reasonable royalty issue. (App. p. A335)

The Separate Proceedings In Ashland Oil, Inc. v. Phillips Petroleum Company

A) The Initial Trial in Ashland and the Resulting Appeal

The above *Ashland* case involved helium produced from only fifteen wells operated by plaintiff Ashland as lessee-producer, with helium removed from resulting

streams by defendant Phillips in two plants owned and operated by it in Texas. The case involved wholly different lands, gas streams and plants than those involved in these *Consolidated Helium Cases.* No landowner-lessors were ever parties to the *Ashland* case, although the trial judge in Oklahoma found that Ashland, the plaintiff lessee-producer, purportedly undertook to represent their interests. (App. p. A483) The trial judge in the *Ashland* case then found the value of the helium involved in that case to be many times greater than the 60 to 70 cents initially determined for the helium involved in the *Consolidated Helium Cases.* (App. p. A477) The court also, *sua sponte,* ordered, as did the trial court after trial of the issue in the *Consolidated Helium Cases,* that the value of the helium be divided equally between Ashland and its lessors. It stated:

> "The equal division between lessor and lessee of the proceeds from the helium is required in equity; otherwise the windfall would give 7/8ths to Ashland and 1/8th to the royalty owners, which would be unconscionable and an unjust enrichment to Ashland." (App. p. A484)

In its cross-appeal to the Court of Appeals (limited to that portion of the judgment requiring Ashland to pay a fifty percent royalty to the landowner-lessors in the fifteen leaseholds in question, owned and operated by Ashland), Ashland, apparently now eschewing its purported representation of its own landowner-lessors, urged reversal of that 50% royalty determination on the ground that it was beyond the power of the district court to determine Ashland's royalty obligations because the landowner-lessors were not parties in the case. Appellant Phillips also noted to the court of appeals that the judgment of the royalty decision was error because Ashland's landowner-lessors were not parties, not present, nor represented in any

respect. Notwithstanding that position espoused by all parties in the case, the court of appeals, *sua sponte*, ignoring its lack of jurisdiction, said that it had already adjudicated the extent of the helium royalty obligation in the earlier appeal of the *Consolidated Helium Cases*. That appeal, above discussed, had reversed the judgment of the Kansas district court which held that the Helex group was not liable to anyone as a consequence of the removal and sale of helium from the gas streams.

The extent of royalty had not been and necessarily could not have been reached by the district court for Kansas in the initial trial of the *Consolidated Helium Cases*. It determined that nothing was due anyone for helium. The court of appeals, nevertheless, in the *Ashland* case construed its previous decision in the *Consolidated Helium Cases*, reversing such non-liability determination, as requiring it to direct judgment *in absentia* against Ashland's landowner-lessors:

> "Our opinion in the *Consolidated Helium Cases* [*Grounds v. Northern Natural Gas Co.*, 441 F.2d 704 (10th Cir. 1971)] requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable." (App. p. A454)

The language just quoted is from an opinion, first dated January 27, 1975, but issued after rehearing *en banc*, and then dated May 10, 1977. (App. p. A429) The language

above quoted directs judgment against Ashland's absent lessors, as aforesaid. The court of appeals in this opinion also directed further proceedings related to the helium value issue. An opinion in substantially the same form had been issued on the earlier date, January 29, 1975, by a three-member panel, but was thereafter withdrawn and a rehearing *en banc* was granted. The *Ashland* case, on rehearing, and the second appeal in the *Consolidated Helium Cases* were then consolidated for argument before an *en banc* court. (App. p. A340) The joint argument occurred in November of 1976. The *en banc* opinion, specifically restricted to the *Ashland* case (App. p. A429), above quoted, was issued on May 10, 1977. However, no decision in the *Consolidated Helium Cases* was forthcoming until November 16, 1981, almost exactly five years after the consolidated argument.

B) The Second Trial in Ashland and the Resulting Appeal

Before that decision in the *Consolidated Helium Cases*, the *Ashland* case was tried again on remand, restricted to the helium value issue. After the trial court in the *Ashland* case had determined a value of $3 per mcf for helium, another appeal was taken to the court of appeals, which affirmed that value. The appellate court, however, reversed the district court's denial of prejudgment interest. (App. p. A389) On the further remand the required prejudgment interest was awarded to Ashland. (App. p. A492) Another appeal was taken in the *Ashland* case as to the prejudgment interest computation.

Subsequent Proceedings In Consolidated Helium Cases

While the *Ashland* case was pending on that third appeal, the appellate court in 1981 informed the parties

to the *Consolidated Helium Cases*, still pending on appeal since 1976, that the *Consolidated Helium Cases* had been placed on abatement status by an undisclosed order of the court of appeals, presumably made nearly five years earlier. The parties to the *Consolidated Helium Cases* were also notified that their cases would be set for further argument, this time jointly with the new appeal in the since decided, re-tried, re-appealed, decided, remanded, further re-tried and once more appealed *Ashland* case. (App. p. A330) Although the *Consolidated Helium Cases* had been argued before the *en banc* Court in 1976, the second argument in the same appeal was to a three-member panel. On November 16, 1981, the decision of the three-member panel was issued. Petitioners now seek review of that decision.

This Court's Opinion In Texaco, Inc. v. Phillips Petroleum Company

This Court has decided only one case related to helium claims in connection with the government helium program. After its 1971 decision in the *Consolidated Helium Cases*, the Court of Appeals for the Tenth Circuit, in a two to one decision, reversed an order made by the District Court for the Northern District of Oklahoma dismissing, for want of federal question jurisdiction, an action brought by a lessee-producer to recover the reasonable value of helium from its natural gas purchaser which also removed helium from the delivered stream for sale to the government. *Texaco, Inc. v. Phillips Petroleum Company*, 481 F.2d 70 (1973). (App. p. A501) The plaintiff there relied upon the 1971 decision of the court of appeals in the *Consolidated Helium Cases* for its position that its claim arose under federal law. The court of appeals majority in that case agreed with the plaintiff and reversed the dismissal. (App. p. A501) The dissent contended that

the claims in the *Consolidated Helium Cases* arose under the common law based upon state law principles of "quasi-contract or indebitatus assumpsit". (App. p. A507)

This Court reversed that holding and adopted the dissenting view:

> "In short, the federal statutory provisions do not under Grounds [*Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971)] create a federal right of recovery, but only preclude the interposition of a plea of payment to defeat a quasi-contractual suit for the value of the helium.
>
> "Texaco's suit for the reasonable value of the helium is, in effect, an action in quantum meruit, whose source is state law and not federal law. Cf. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 39 L.Ed. 2d 73, 94 S. Ct. 772 (1974). To the extent that the Natural Gas Act and the 1960 Helium Act Amendments may bear on this action for the recovery of the reasonable value of constituent helium in natural gas, it is clear that their effect is no more than to overcome a potential defense to the action." *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 at 128-29 (1974). (App. p. A500)

Notwithstanding this Court's reversal and holding in that case, the court below in subsequent opinions in the *Ashland* case and now in its most recent decision in the *Consolidated Helium Cases*, here sought to be reviewed, persists in refusing to follow state common law in determining the extent of the helium royalty due from the lessee-producers to their landowner-lessors. Thus, in its 1977 *Ashland* opinion, the court of appeals continued to insist contrary to this Court's 1974 decision in *Texaco*, that federal law governed its 1971 decision in the *Consolidated*

Helium Cases through its approval of federal law by the lower court:

> "The trial court tried the case as a federal question case, relying on our opinion in *Texaco Inc. v. Phillips Petroleum Co.*, 481 F.2d 70 (10th Cir.) which was thereafter reversed by the Supreme Court in *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 94 S. Ct. 1002, 39 L.Ed. 2d 209. That case was concerned only with federal question jurisdiction under 28 U.S.C. §1331(a), and not whether state or federal law controls. The United States was not there a party. Federal jurisdiction is here conceded.
>
> "The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied." (App. p. A448)

The court below again reaffirmed in its last opinion in the *Consolidated Helium Cases*, sought to be reviewed herein, its continued adherence to the view that federal law controls the rights of its parties in these actions (App. pp. A16 and A26), again contrary to this Court's opinion in the *Texaco* case.

Through this unwarranted application of federal law to the claims of petitioners herein, the court below has deprived landowner petitioners of the 50% helium royalty inuring to them under the controlling state law principles required to be observed directly by the decision of this Court in *Texaco*.

REASONS FOR GRANTING THE WRIT

I

The Court Below Has Ignored, If Not Defied, This Court's Decision In Phillips Petroleum Company v. Texaco, Inc., 415 U.S. 125, Holding That State Law Governed The Disposition Of The Instant Claims

While these petitioners disagreed with the court of appeals' construction of the lease granting clauses in its 1971 *Consolidated Helium Cases* decision, petitioners are not in any way now seeking to challenge that holding. Petitioners assumed that decision, insofar as it pertained to the issue of lease coverage, had application only to the lease granting clauses, and both they and the district court, on remand, further assumed that the amount of royalty payable for helium would be addressed for the first time at the trial level on remand. In fact, the second trial of the *Consolidated Helium Cases* proceeded on that basis. The trial resulted in the aforesaid award of a 50% royalty, based upon *quasi-contract* or *quantum meruit* principles, rather than a determination of royalty based upon the lesser royalty fractions specified in most leases for gas in the form of hydrocarbons, concededly the only substances specifically contemplated by the parties when the leases were executed.

Under common law principles prevailing in the pertinent state forums, the lease grant of gas embraced helium because of the physical necessities involved in the production and marketing of the hydrocarbons contemplated by the parties, but the helium grant extended no farther than necessary for the accomplishment of those intended lease purposes. These common law principles do not support a conclusion that the oil and gas lease royalty frac-

tions were intended to apply to a commodity whose existence and value were unknown when those leases were executed.

A lease on minerals may occasionally grant a license to produce oil or gas, but not both. Nevertheless, if in producing and marketing that product specified in the grant, it becomes unavoidable that the other product not granted be taken, such right to take the unspecified product is deemed to be included in the grant, but only insofar as necessary.

> "The right to take the oil carried with it by implication the right to tap the gas pockets and to bring to the surface so much of the gas as was necessary in the proper drilling for oil. The grant of the oil carried with it a grant of the way, surface, soil, water, gas, and the like essential to the enjoyment of the actual grant of the oil." *Guffey v. Stroud*, 16 S.W.2d 527, 528 (Tex. Com. App. 1929).

The general rule is succinctly expressed in an Iowa common law opinion:

> "In other words, the right of way having arisen by necessity, the possession and use thereof was always referable to that right alone, and could not be made the foundation or ground for the assertion of a higher right, and would cease when the necessity ceased." *Rater v. Shuttlefield*, 146 Iowa 512, 125 N.W. 235 at 238 (1910).

The same common law principle uniformly prevails.

> "The presumption that defendants intended that their grantee and his successors in title should reasonably enjoy the premises as they existed and according to their accustomed use at the time lot 2 was conveyed could not equitably be enlarged to include

> other uses not within the implied intention of the parties at the time defendants conveyed the property to plaintiffs' predecessor in title." *Moll v. Ostrander*, 124 Kan. 757, 762-63, 262 P. 592, 594-95 (1928).

Further, under universal common law rules, when, as here, one party receives a benefit at the expense of the other, without agreement as to payment, there is a presumption that reasonable payment is to be made.

> "Quasi contracts—contracts implied in law—are not true contracts. They are obligations created by law for reasons of justice." *Sharp v. Sharp*, 154 Kan. 175, 178-79, 117 P.2d 561, 563-64 (1941).

Not until the court below in its 1977 decision in the *Ashland* case appeared to have construed its former decision in the *Consolidated Helium Cases* as having been decided under federal law, with the result that a grant of helium by necessity under conventional oil and gas leases was said to further entail application to helium of the specified lease royalty provisions, did it become apparent that the court of appeals did not intend to adhere to this Court's holding that these suits for recovery of the reasonable value of helium are "in quantum meruit, whose source is state law and not federal law". 415 U.S. 125 at 129.

We cannot comprehend how the court below could have misunderstood this Court's directive to apply state law in this and all similar actions. Certainly, had the court below felt obligated to observe state law principles, the outcome could only have resulted in affirmance of the quasi-contractual royalty awarded by the trial court.

While the courts of appeal may be the courts of last resort for all practical purposes in nearly all federal actions, Article III of the Constitution does not vest the

supreme federal judicial power in such courts. And for such reason, the rules of this Court specifically provide for review of decisions of courts of appeal that, as here, conflict with applicable decisions of this Court. Rule 17.1(c).

II

By Deciding The Landowners' Claims To A Reasonable Helium Royalty In An Action In Which No Landowners Were Parties And By Purported Construction Of A Prior Decision In Which The Amount Of Such Royalty Was Not Justiciable, The Court Below So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Warrant Exercise Of This Court's Supervisory Power.

In the opinion sought to be reviewed herein, the court below, in refusing to review the trial court's findings and conclusion on the royalty issue because of its previous opinion in the *Ashland* case, stated:

> "In *Ashland I, supra,* this court also held that, absent specific reservations, the grant of gas by the subject leases covered all components of the gas, including helium which would entitle the landowners-lessors to one-eighth (1/8th) of the proceeds of the helium marketed from each well '. . . if sold at the well, or if marketed by lessee off the leased premises, then one-eighth (1/8) of the market value thereof at the well . . .' That *Ashland I* considered and settled the right and interest of the lessors and lessees to the value of helium was confirmed in our opinion in Ashland II:
>
> > 'Our opinion in the *Consolidated Helium Cases* (*Ashland I*) requires that this division be in accordance with the lease terms and thus the same division as applied to the hydrocarbons. The judg-

> ment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with direction to enter judgment providing for a division in accordance with the terms of other agreements relating to the share of production, or payment for shares of production, if such be applicable. 554 F.2d at p. 392.'" (App. pp. A16-17)

With this language, the court below in 1981 disposed of petitioners' royalty claims, which claims had been asserted since the 1971 decision of the court of appeals in the *Consolidated Helium Cases*. The language, above quoted, completely conceals the rationale of the court's refusal to review the trial court's findings and conclusions on the royalty issue. It is impossible to determine whether the court of appeals, in attempting to justify its refusal, relied on its 1977 opinion in the *Ashland* case[1] or on its 1979 opinion in the *Ashland* case[2] or on its earlier 1971 opinion in the *Consolidated Helium Cases*.

In the language above quoted, the court below first relies on its 1977 *Ashland* opinion, identified by the court as *Ashland I*. It is true that the court of appeals first considered the royalty issue in the *en banc* opinion in that case, but it must be admitted that in *Ashland* the court of appeals attempted to adjudicate the royalty issue in an action in which no landowner-lessors were present. As with all Article III federal courts, the court below had no power to adjudicate an issue in the absence of a case or controversy. The essence of those terms "is the requirement of adverse litigants presenting an honest and antagonistic

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1. This 1977 opinion is earlier described in the opinion sought to be reviewed as the opinion in *Ashland I* and as being reported at 554 F.2d 381. (App. p. A4)

2. This 1979 opinion is earlier described in the opinion sought to be reviewed as *Ashland II* and as being reported at 607 F.2d 335. (App. p. A5)

assertion of rights". Corwin, *The Constitution*, p. 214, 14th Ed. (1978). Surely, it also goes without amplifying authority that the due process clause of the Fifth Amendment prohibited the adjudication in the *Ashland* case of the helium royalty rights of any Ashland landowner-lessor, not to mention the rights of other landowner-lessors in the *Consolidated Helium Cases*, petitioners herein, when none of them were parties to that proceeding.

The court then attempts to buttress its refusal by reference to its 1979 opinion in the *Ashland* case, stating that its consideration and settlement of the royalty issue "was confirmed in our opinion in *Ashland II*". The same Article III and Fifth Amendment impediments are present to forbid this reliance, there still being no landowner-lessors present in that later appeal. Contrary to the court's present representation, there is not one word in the opinion in *Ashland II* about any landowner or lessor or about a royalty fraction or about any royalty issue.[3]

The court attempts to further buttress its refusal by falling back on its 1971 opinion in the *Consolidated Helium Cases*[4] as holding that the lease royalty provisions governed

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3. The last paragraph of the language above quoted from the opinion sought to be reviewed is a quotation from another case. It is that quotation to which the court points as confirming what was said in *Ashland I*. Actually, the quotation is from *Ashland I* itself and not from *Ashland II*, a fact which makes complete nonsense out of the court's statement that *Ashland II* "confirmed" what was said in *Ashland I*. (See App. p. A454, which contains the quotation found in *Ashland I*)

4. In quoting from *Ashland I* (erroneously describing the quotation as being contained in *Ashland II*, as pointed out in footnote 3 above) the court below also gratuitously added the parenthetical expression "(*Ashland I*)" immediately following the phrase "Our opinion in the *Consolidated Helium Cases*." Such parenthetical expression does not appear in the original at 554 F.2d at 391-92. (App. p. A454) If this insertion conveys the impression that the *Ashland* case and the *Consolidated Helium Cases* were an identity or that the opinion in *Ashland I* was also an opinion in the *Consolidated Helium Cases*, it is a wholly erroneous and completely contrary to the fact.

compensation for the taking of helium, even though the lessee-producers' gas purchase contracts did not. We have already discussed above the error resulting from the court's failure to apply state law in direct disregard of this Court's opinion in *Texaco*. But beyond this error, due process clearly prevents reliance on that 1971 *Consolidated Helium Cases* decision. That reliance required the court below to make the unwarranted assumption that it, in its previous decision in the *Consolidated Helium Cases*, had reached out and disposed of an issue never considered by the trial court nor ever embodied in an order from which an appeal could be taken.[5] Not even this Court, in the exercise of its appellate powers, passes upon issues never addressed below. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980). It is in the proceedings resulting in the decision sought to be reviewed herein that the trial court first considered the royalty fraction issue and entered a judgment on this issue from which an appeal could be taken. When the issue was finally presented for the first time to the court of appeals, the court below then refused to review the trial court's undisputed findings entitling petitioners to the 50% royalty participation under applicable common law. The court below attempted to justify this refusal through the utilization of obfuscatory language which has the same effect on the outcome of this litigation as would a mere shell game.

The illusory disposition of petitioners' common-law claims by the court below, through the creation of a federal law of oil and gas leases, purportedly created in cases in which neither petitioners nor any other landowners were

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5. If the gratuitous parenthetical insertion of "(*Ashland I*)" means that the court of appeals first considered the royalty issue in the opinion in *Ashland I*, petitioners certainly agree that, in fact, such was the case because the royalty issue was not and could not have been before the court in the earlier appeal of the *Consolidated Helium Cases*.

present and in which the issue itself was not present, constitutes total disregard of the directives of this Court in *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125. Such procedural irregularities require the exercise of this Court's supervisory powers.

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No. 81-1919

In the Supreme Court of the United States

October Term, 1981

RALPH GROUNDS, ET AL. (Landowners Group),
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.
(Lessee-Producer Group),

AND

NORTHERN NATURAL GAS COMPANY, ET AL.
(Helex Group),

AND

UNITED STATES OF AMERICA, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO BRIEF OF PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT

While expressing support for landowner-petitioners' request to this Court to rectify the failure of the circuit court to afford Petitioners a hearing on their royalty claims, Respondent Panhandle Eastern Pipe Line Company and

National Helium Corporation would take away with the left hand what they give with the right. In the vernacular of the day: with friends like these, landowners have no need for enemies.

Although conceding that the court below purported to decide *in absentia* landowners' royalty claims, these Respondents argue that the same outcome would have resulted, even if a justiciable royalty issue had been before the circuit court in the *Ashland* cases, even if these Petitioners had been parties thereto and even if due process had been afforded. This is so, they say, because in the earlier *Grounds* case, to which Petitioners were parties, the circuit court held that helium is "covered by the leases." (Respondents' Brief in Support, p. 4) Further, they say, on the same page, in arriving at a fifty percent division of the helium value, the trial court relied upon no authority and, instead, violated the express written provisions of the leases.

The major premise, assumed in Respondents' contentions, is that the circuit court, when reversing the trial court's decision in *Grounds I* that Respondents had no liability whatsoever for helium, reached out beyond that issue to consider and decide the extent of the helium royalty due from producer to landowner. Respondents even flatly state that all parties here are in agreement that the leases cover helium. (Respondents' Brief in Support, p. 4) If that statement has any legally cognizable meaning, Petitioners are in utter disagreement with it for the reasons that follow.

ARGUMENT

Petitioners do agree that the court below held in *Grounds I* that the granting clauses of the leases confer upon the producers all such rights with respect to helium as may be necessary to the production and marketing of natural gas, even though it is undisputed that the landowners were entirely ignorant as to the presence and value of helium. As the authorities cited in landowners' Petition illustrate, universal common-law principles, governing implied grants arising by necessity, compel such agreement as to the impact of the lease granting clauses.

> "It may be stated as a general proposition that an oil and gas lessee is privileged to utilize all substances other than oil and gas in the process of extracting oil and gas, and he may do so without liability to the owner or other person entitled to extract such other substances. In a sense, such substances are 'covered' by the oil and gas lease, but the right to the use of such substances does not carry with it the right to ownership of such substances if they are captured and saved." Kuntz, *Law of Oil & Gas*, §24.1, p. 205 (1964).

That the first *Grounds* opinion pertains only to the granting clauses of the leases - and does not purport to deal with the amount of royalty due - is clearly evident from the pertinent language in that opinion.

> "The trial court held that the grant of gas in each lease 'extends to the entire gas stream which emerges at the wellhead absent an express reservation of any constituent products, and that helium passes thereunder unless expressly reserved.'" (A143)
>
> "In the Hugoton area, helium emerges as a component of the gas produced from a gas well. It neces-

sarily comes from the wellhead and into the transmission line with all the gases which make up the entire stream." (A148)

"The trial court found that gas did not connote helium to the average landowner, that no landowner specifically contemplated helium in granting rights to produce gas, and that other evidence establishes 'that he had no intention whatever respecting it.' 292 F. Supp. at 664. Such findings are supported by substantial evidence and we must accept them." (A150)

"We believe that the search should be for general intent rather than for a supposed, but unexpressed, specific intent. General intent should be discovered not by defining and redefining the terms used but by considering the purposes of the grant in terms of enjoyment of the rights created." (A151)

"The discovery of the use and value of a component does not expand the grant but the expansion of that discovery into tangible value makes more certain the specific object of the general grant. We conclude that, absent specific reservations, the grant of gas by the leases covered all components of the gas, including helium." (A152-153)

It is, of course, a blatant *non sequitur* to conclude that, because the lease granting clauses confer title to the extent of the right to produce helium, as a matter of functional necessity in connection with the production of commodities understood to have value, all provisions of the entire lease, including the royalty clauses, embrace helium. Resort to such opaque concepts as "title" and "covers" simply avoids analysis of the actual issue as to whether the parties to the lease intended that the lease royalty payment, applicable to marketing of commodities known to exist when the

leases were executed, also applied to an entirely distinct substance whose existence was not then known.

> "To classify plaintiffs' or defendant's interests here under one or more of the categories of 'title,' 'equitable servitude in property,' or 'contractual right' does not settle the problem. The rights of both parties can be fitted into various of these categories. Indeed, the inveterate use of the labels 'property' or 'title' as group symbols, denoting a 'bundle' of rights or other legal relations, is now well understood; it is only when we advance beyond these forms to the questions of degree, or of number and value of such rights, that we come to a solution of problems such as this. See 1 Restatement, Property, 1936, 3, 4, 10-12, 27-30; Hohfeld Fundamental Legal Conceptions, 1923, 3, 12, 67 et seq.; 26 Yale L.J. 710, 112, 746; 28 Id. 721, 729; Rohmer v. C.I.R., 2 Cir., 153 F.2d 61, 64, certiorari denied 328 U.S. 862, 66 S.Ct. 1367, 90 L.Ed. 1623; Morris Plan Industrial Bank of New York v. Schorn, 2 Cir., 135 F.2d 538, 540; authorities cited in Clark, Real Covenants, 2d Ed. 1947, 4, 30, 156." *Standard Oil Co. v. Clark*, 163 F.2d 917 at 930 (2d Cir. 1947).

The experienced lawyer-judges who tried the Oklahoma and Kansas helium cases both concluded that the lease parties could not possibly have actually intended to agree upon the compensation due for a commodity that they did not even know existed. They knew that no reasons based upon necessity, fairness or industry economics could justify the imposition of a judicially created constructive intent in place of non-existent actual intent. Accordingly, they concluded that in the absence of agreement as to royalty for helium, a reasonable royalty should be paid. The trial judge below properly found *as a matter of fact*,

based upon unchallengable evidence, that a fifty percent helium royalty was reasonable under the circumstances.

The refusal of the court of appeals to even consider the findings made by the trial court herein with respect to the extent of the helium royalty due to landowner Petitioners has not merely deprived them of their procedural rights; it has resulted in many instances in the transfer from landowners to the producers of 75% of the amount undisputedly comprising a reasonable royalty for the helium.

CONCLUSION

Landowners' Petition should be granted on the grounds previously urged, presently entailing the deprivation of Petitioners' fundamental procedural rights *and* their substantial property interests.

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Joint Appendix

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MOBIL OIL CORPORATION, ET AL. (Lessee-Producer Group),
NORTHERN NATURAL GAS COMPANY, ET AL. (Helex Group),
and
UNITED STATES OF AMERICA (Intervenor),
81-1920
Respondents.

PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION, *Petitioners,*
vs.
MOBIL OIL CORPORATION, ET AL., and RALPH GROUNDS, ET AL., *Respondents,*
81-1921
and
UNITED STATES OF AMERICA, *Intervenor.*

NORTHERN NATURAL GAS COMPANY and NORTHERN HELEX COMPANY AND NORTHERN GAS PRODUCTS COMPANY,
Petitioners,
81-1922
vs.
MOBIL OIL CORPORATION, ET AL., and RALPH GROUNDS, ET AL., *Respondents,*
and
UNITED STATES OF AMERICA, *Intervenor.*

CITIES SERVICE GAS COMPANY, CITIES SERVICE CRYOGENICS, INC. and CITIES SERVICE HELEX,
Petitioners,
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MOBIL OIL CORPORATION, ET AL., and RALPH GROUNDS, ET AL., *Respondents,*
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UNITED STATES OF AMERICA, *Intervenor.*

JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit, Dated November 16, 1981 (666 F.2d 1279)

(Filed November 16, 1981)

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 74-1886 through 74-1894
Nos. 75-1014 through 75-1035
Nos. 75-1051 through 75-1061
Consolidated Helium Cases II

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),

v.

RALPH GROUNDS, et al., (Landowners Group),

and

SOCONY MOBIL OIL CO., et al., (Lessee-Producer Group).

Appeal From the United States District Court
For the District of Kansas
(D.C. Nos. KC-1945, 1946, 1947, 1948, 1969 and 1980)

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Clifford L. Malone and Mark H. Adams, II, of Adams, Jones, Robinson and Malone, Chartered (Mark H. Adams with them on the brief), Wichita, Kansas, for Northern Natural Gas Company, Northern Helex Company, Northern Gas Products Company, Cities Service Gas Company, Cities Service Cryogenics, Inc., and Cities Service Helex, Inc. (Dean Wallace and Patrick J. McCarthy, Omaha, Nebraska, with them on the brief, for Northern Companies).

James B. Diggs, Oklahoma City, Oklahoma, for Gulf Oil Corporation.

Jack D. Sage of Hershberger, Patterson, Jones & Roth (Richard Jones with him on the brief), Wichita, Kansas, for Mobil Oil Corporation, MAPCO, Inc., The Superior Oil Company and Diamond-Shamrock Corporation.

R. H. Landt, Denver, Colorado (Glenn D. Young, Jr., Wichita, Kansas, with him on the brief), for Amoco Production Company.

Gerald Sawatzky of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, for Ashland Oil, Inc., Atlantic Richfield Company, Cabot Corporation, Dorchester Gas Producing Company, Helmerich & Payne, Inc., and Texaco, Inc. (Arloe W. Mayne and Douglas C. Brandon, Ashland, Kentucky, for Ashland, Oil, Inc., James R. Coffee, Dallas, Texas, for Atlantic Richfield Company, William C. Charlton, Houston, Texas, for Cabot Corporation, Leon C. Gavras, Tulsa, Oklahoma, for Helmerich & Payne, Inc. and J. Frederick Lawson, Tulsa, Oklahoma, for Texaco, Inc., with him on the brief).

Joseph W. Kennedy of Morris, Laing, Evans, Brock & Kennedy, Wichita, Kansas (Kenneth Heady, General Counsel, C. J. Roberts, Associate General Counsel, Phillips Petroleum Company, Don L. Jemison, Bartlesville, Oklahoma, and L. K. Smith of Boone, Smith, Davis & Hurst, Tulsa, Oklahoma, on the brief), for Phillips Petroleum Company.

Gerrit H. Wormhoudt (Dale M. Stucky and Donald R. Newkirk with him on the brief), Wichita, Kansas, for Ralph Grounds, O. W. Hegler, et al. (Landowners Group).

Laura Frossard, Attorney, Department of Justice (Carol E. Dinkins, Assistant Attorney General, Jacques B. Gelen and Andrew F. Walch, Attorneys, Department of Justice, with her on the brief), Washington, D.C., for United States of America.

Before SETH, Chief Judge, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

The difficult issue determined by the United States District Court for the District of Kansas in its judgment of December 16, 1974, presented for our review involves the question of the reasonable value of the helium content of processed natural gas to be paid by the processors-extractors to the lessee-producers, who, in turn, must account by royalty payments to the landowners.

The appeal of these consolidated cases from the United States District Court for the District of Kansas, known as *Consolidated Helium Cases II* or *Grounds II*, was consolidated for *en banc* briefing, hearing and argument with

an appeal from the United States District Court for the Northern District of Oklahoma in a case entitled *Ashland Oil, Inc. v. Phillips Petroleum Company.* The consolidated cases involved one dominant identical issue, *i.e.*, the determination of the value of the helium content of processed natural gas for accounting-payment purposes. The *en banc* hearings before this court were held November 17, 1976. This court's *en banc* opinion dealt with many issues presented and in common in the separate appeals.

The *en banc* opinion resulted in a remand directly and exclusively to the Oklahoma district court. The *en banc* opinion was titled *Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d 381 (10th Cir. 1977), *cert. denied*, 434 U.S. 968 (1977), hereafter referred to as *Ashland I.* The Kansas appeal was held in abatement. The practical consideration for the use of the abatement procedure was to employ only one district court initially for a redetermination of the helium valuation pursuant to the specific guidelines, directions and instructions contained in *Ashland I.* It was believed that further Oklahoma district court proceedings would serve to resolve the valuation issue in the related cases.

On remand, the Oklahoma district court held a trial to determine the valuation issue. The court found, *inter alia*, that: the proper starting value for use of the work-back method of valuation was not the market value of Grade A helium, but the market value for crude helium, which is helium after it is separated from the natural gas stream, but yet mixed with nitrogen and other gases; the contract price of approximately $10.30 m.c.f. for which the United States purchased crude helium from Phillips Petroleum Co. was a fair price for crude helium, and was, accordingly, a proper price to use as a starting value; after deducting various processing costs, the work-back

method resulted in a value of the commingled helium at the wellhead between $2.50 and $5.50 per m.c.f.; because the action was equitable in quantum meruit, the "rigid applications of mathematical calculations" were not pertinent, and $3.00 per m.c.f. as a single uniform value of the contained helium for each year was proper; Ashland was not entitled to prejudgment interest because the amount owed to Ashland had been unliquidated and in good faith dispute, and; Ashland was entitled to postjudgment interest from date of the judgment on remand. *See Ashland Oil, Inc. v. Phillips Petroleum Co.*, 463 F.Supp. 619 (N.D. Okl. 1978).

On appeal, this court affirmed the $3.00 value arrived at by the district court's use of the work-back method and the court's award of post judgment interest from the date of the judgment on remand. We reversed, however, the district court's denial of prejudgment interest on the ground that its allowance was the law of the case. Thus, the cause was again remanded for the entry of judgment to include prejudgment interest. *See Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980), hereafter referred to as *Ashland II*.

In our *Ashland II* opinion, we said:

> This case was remanded for the development of additional facts relating to and to provide a basis for the valuation of the helium at the wellhead by the use of a work-back method. See *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 554 F.2d 381 (10th Cir.). The trial court was to determine a proper starting place and value for such method, the plant cost, return on investment, the costs chargeable to production of liquid hydrocarbons, and related facts.

On remand the trial court selected as a starting point the stated value of helium used in the contract between Phillips and the Government. For a brief description of the contract, see 554 F.2d, at 384. This determination by the court was based on the expert testimony relating to pure helium values and other possible starting points for the valuation of helium. *A starting place for the work-back method can be at any point in the production—processing sale chain where a dollar figure can be established by reliable evidence, and which may be demonstrated to be a realistic value.* We see no objection to the use of the contract value for this purpose. It was a negotiated figure arrived at by parties dealing at arm's length. There may have been other considerations involved, but on remand these do not appear to have been substantial enough to cast doubt for our purposes on the contract price. This figure was not greatly different from those used in contracts for other extraction plants.

Using this figure the trial court made findings as to plant investment and rate of return. These factual determinations were made after a consideration of the testimony and are supported by the record. The appellant urges that there are factors which should not have been included in the plant cost figure or in the total "capital employed" upon which Phillips was entitled to compute a return. However, again this was a fact-finding element, and the result was supported by the record. [Emphasis supplied].

607 F.2d at p. 336.

On January 15, 1981, the district court in Oklahoma entered an order in the *Ashland* case directing that prejudgment interest be calculated on the value of the helium

determined on the last day of each year and that interest at the rate of six percent per annum be calculated thereon. That determination was appealed by Ashland and consolidated with the matters here involved in *Consolidated Helium Cases II* or *Grounds II* arising from Kansas. The parties, per request of this court, submitted supplemental briefs addressing both the legal and factual developments which have taken place since *Helex II* or *Grounds II* was argued before this court *en banc* on November 17, 1976. Our discussion of the issues shall be confined, to the extent possible, within that time frame.

Part I of this opinion is a brief review of the helium conservation program. It may aid in placing in focus the difficult problems with which the various parties and the courts have been confronted.

We will not treat and consider the arguments and contentions raised by the parties prior to our *en banc* hearing of November 17, 1976, leading to our *en banc* opinion in *Ashland I* except to the extent necessary here. This is so because many of the applicable rules of law have been announced and settled by our *Ashland I* and *Ashland II* and these rules now constitute the law of the case in *Helex II* or *Grounds II* before us here. With this background, we have elected to dispose of the matters on this appeal, in this manner:

(a) *Part II* discusses the contentions of the parties on the valuation methods-procedures and that adopted by the trial court. We conclude that the District Court erred in rejecting the "work back" method of valuation computation directed by this Court's *en banc* opinion in *Ashland I* and thereafter reaffirmed in *Ashland II*.

(b) *Part III* holds that $2.00 per m.c.f. is the minimum, the floor, to which the lessee-producers and landowners are entitled.

(c) *Part IV* holds that the District Court did not err in the award of prejudgment interest.

I.

Helium is an unusual element, noncombustible and the second lightest known element. It is so inert that it will not chemically react or combine with other elements. During the past 25 years it has become of growing importance to national defense, science and industry.

During World War I, large volumes of helium were used for lighter-than-air aircraft. Thereafter, helium found important uses in the field of medicine and for diving and submarine operations. During World War II, helium was vital in the development of atomic energy and as a shield in arc-welding of such metals as magnesium, aluminum, and stainless steel. It is now very important in the fields of nuclear and cryogenic research and in industrial applications.

In 1958, a report submitted by a group chaired by then undersecretary of the Interior O. Hatfield Chilson observed that the only practical method of conserving helium which would otherwise be wasted to the atmosphere was to construct and operate helium plants to extract helium from helium-bearing natural gas which is essentially concentrated in four fields, to-wit: (1) the Hugoton Field of Texas, Oklahoma and Kansas, (2) the Panhandle Field of Texas, (3) the Keyes Field of Oklahoma, and (4) the Greenwood Field of Kansas. These fields contain 99% of the nation's recoverable supply of helium.

The Chilson report bore fruit in the enactment of the 1960 Helium Act Amendments, 50 U.S.C.A. § 167, *et seq.* This legislation authorized the Secretary of the Interior to enter into long term contracts to acquire, process, transport or conserve helium for a period not

exceeding 25 years. The Bureau of Mines was directed to contract with private industry plants having under their control or access volumes of gas with sufficient helium content to justify economic extraction. These contracts were entered into expeditiously in order to prevent waste of the helium, inasmuch as the 1960 Amendments required that all contracts made by the Secretary for the purchase of helium from private plants contain provisions forbidding the sale of helium to any purchaser other than the United States at a price lower than the lowest price paid by the United States (subsequently set by the Secretary at $35.00 per m.c.f.) for helium produced from any private plant.

It was not possible for the United States to undertake extensive title checks prior to contracting in order to determine the landowners and their interests (some 30,000) and the lessee producers (several hundred) in view of the urgency in conserving the helium, which some have estimated will be depleted in the aforementioned fields by the year 1985. Thus, waste was prevented and the United States obtained possession of the helium from the purchasers-processors under various contracts. Any litigation relative to value and divisions of interests involving landowners and lessee-producers was, in effect, postponed "until another day".

Some of the "postponed" knotty legal problems were in large measure addressed and decided in *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951 (1971); *cert. denied*, 404 U.S. 1063 (1972), U.S. *reh. denied*, 404 U.S. 1065 (1972), sometimes referred to as *Consolidated Helium Cases I* or *Grounds I*. There, the basic legal relationships were defined and controlling rules were laid down. We there held that the Helex companies (purchasers-extractors) ". . .

must account to the lessee-producers for the reasonable value of the helium contained in the processed gas and the lessee-producers must pay royalty on such value to the landowners." 441 F.2d at p. 707. We reversed and remanded.

The consolidated appeals heard *en banc* November 17, 1976, include the instant appeal which is the result of the Kansas district court's proceedings following reversal and remand in light of *Grounds I*.

Following the remand, the further proceedings resulted in the decision of the Kansas district court which is the subject of this opinion.

II.

The Helex Group are the corporations which transport through pipelines the natural gas from the lessee-producers to their extraction plants where the helium is extracted and sold to the United States. These companies were fully aware, during the course of the 1974 proceedings in Kansas upon remand, that in the 1973 Oklahoma proceeding the work-back method of valuation had been employed. Even so, the Helex companies opposed the work-back method in the Kansas case and did not contend, alternatively, that the base contract price should be the valuation starting point.

The District Court likewise rejected the "work back" method of valuation, and specially rejected the theory of valuation advanced by the lessee-producers and landowners. The court found/observed:

> Briefly stated, the sole theory of value offered by Lessee-Producers and their co-parties in interest, the Landowners, was based upon the premise that there were no comparable sales of commingled helium

at the wellhead by which value could be ascertained, and that therefore, the proper method to arrive at value was to use a "proceeds less expense" approach to the question, so as to "work down" to a proper figure. In applying this theory, the Lessee-Producers urge that the first free, open, competitive market is that of sale of Grade A helium, the state in which helium is bought by and sold to, the ultimate consumer. Thus, the Lessee-Producers start their "work down" approach, not with the *actual* proceeds received by the Helex companies from sales of conservation helium to the Bureau of Mines, which was approximately $12.00 per Mcf for contained helium in the crude helium mixture, but rather with a figure of $20.00 per Mcf which they represent to be a conservative, average estimate of the "market value" of Grade A helium sold to ultimate consumers during the years 1963-1971.

From this figure of $20, the Lessee-Producers would deduct the "cost of purification" of crude helium into Grade A helium, estimated to be $2.00 per Mcf, and then subtract "costs of extraction", to arrive at a final value for the helium content of the gas stream processed in each individual helex plant for each of the several years.

The "costs of extraction" [LPX 2-19] were computed by taking operating expenses from company records (with certain adjustments believed to be required by Lessee-Producers' experts), adding on a figure which the producers considered to be a "fair rate of return" on the helex companies' investments," and then deducting from these expenses a figure determined to be a "by-product liquid credit", which was arrived at by computations concerning profits realized

by the Helex companies from their liquid hydrocarbon extraction operations, which were carried on in conjunction with helium extracting activities.

[R., Supp. Vol. I, pp. 44-45]. [Footnotes omitted].

We must hold that the District Court erred in rejecting the "work back" method of valuation computation directed by this court's *en banc* opinion in *Ashland I, supra,* and thereafter reaffirmed in *Ashland II, supra.*

The record does not evidence any material, significant differences between the contracts and contractual relationships existing between the parties involved in the Kansas and Oklahoma proceedings. The significant difference in the evidence presented in the two cases, and that relied on primarily by the Kansas district court in rejecting the "work back" method was the testimony of one Dean Bowers, of Dallas, Texas, a professional registered chemical engineer and a consultant who is an expert in the economic evaluation of analysis of oil and gas processing procedures. Bowers pointed to the wide variation in the contained helium in the gas stream at the various processing plants which, in turn, resulted in a substantial difference, from plant to plant, in the ultimate cost of recovery. He stated that the key factor in the plant-to-plant calculation was the measure of reduced recovery costs resulting in higher helium content. In basic reliance of the Bowers' evaluations-computations, the District Court found that the reasonable value of the helium content at "the time and at the point" it was delivered to the Helex companies was between 60 cents per m.c.f. of helium and 70 cents per m.c.f. of helium, calculated annually between 1961 and 1972.

In rejecting the "work-back" method, the District Court did not find that there were comparable sales which

establish a market price or value for commingled helium, but rather because the court determined that "work-back" from the value of the refined Grade A helium ". . . is simply unreasonable and that determination of the value of 'raw materials' is not determined upon a 'proceeds less expense' theory in the American economy." *Northern Natural Gas Co. v. Grounds*, 393 F.Supp. 949, 982 (D.C. Kan. 1974). This finding is anchored to the opinion expressed by Dean Bowers.

The "work back" method became the law of the case as a result of our *en banc* opinion in *Ashland I*. The record before us from the Kansas court does not establish evidence of comparable sales for the determination of market price or value for the commingled helium. The evidence in this regard, *i.e.*, comparable sales, consisted of the same purchase contracts, with the exception of two, which this court reviewed and found to be non-comparable in *Ashland I*. The two contracts not previously considered by this court in *Ashland I* are both post-litigation generated. Thus, they do hot, as contended by the Helex companies, constitute a wealth of comparable sales in addition to those before this court in *Ashland I*. In any event, the Kansas court did not expressly find that any of these contracts established comparable sales. Instead, the court simply observed that the contracts do not contain any provisions relating to price adjustments involving the extraction of helium.

We must reject the Helex companies' further contention that their proffered 41 FPC rate scheduled contracts filed with FPC and the some 25 intrastate gas purchase contracts are examples of comparable sales in addition to those offered in *Ashland I*. They do not render vulnerable our prior holding that such contracts do not meet the measure of comparable sales. They are, we hold,

as non-comparable as the contracts considered in *Ashland I*. Accordingly, the work-back method applies with full force in the case at bar. In *Major v. Benton*, 647 F.2d 110 (10th Cir. 1981), we observed:

> . . . When a court enunciates a rule of law in the course of a given case, the law of the case doctrine generally requires the court to adhere to the rule throughout the proceedings. 1B Moore's Federal Practice 0.404[1] at 402-03. The rule is one of expedition, designed to bring about a quick resolution of disputes by preventing continued reargument of issues already decided. . . . Unlike *res judicata*, the rule is not an "inexorable command," but is to be applied with good sense . . . . Courts have generally permitted a modification of the law of the case when substantially different, new evidence has been introduced, subsequent, contradictory controlling authority exists, or the original order is clearly erroneous.
>
> 647 F.2d at p. 112.

The case must be remanded with instructions that the District Court employ the "work back" method mandated by the court's *en banc* opinion in *Ashland I* as the proper method of determining the value of the processed helium. We do not here determine the proper starting point for such work-back valuation. In *Ashland II*, the stated value of helium used in the contract between Phillips and the United States was selected by the District Court as the starting point. In affirming, we said:

> This determination by the court was based on the expert testimony relating to pure helium values and other possible starting points for the valuation of helium. *A starting place for the work-back method can be at any point in the production—processing—sale*

chain where a dollar figure can be established by reliable evidence, and which may be demonstrated to be a realistic value. We see no objection to the use of the contract value for this purpose. It was a negotiated figure arrived at by parties dealing at arm's length. There may have been other considerations involved, but on remand these do not appear to have been substantial enough to cast doubt for our purposes on the contract price. This figure was not greatly different from those used in the contracts for other extraction plants. [Emphasis supplied].

607 F.2d at p. 336.

III.

In *Northern Natural Gas Company v. Grounds,* 441 F.2d 704 (10th Cir. 1971), (*Grounds I*) we observed that: the question of title to helium arose during the contract negotiations between the Helex companies and the Bureau of Mines following the 1960 amendments to the Helium Act; *the Helex companies agreed to warrant title and indemnify the United States for all ownership claims of third parties;* however, the ultimate cost each seller might have to bear was, per contract, limited to $3.00 per m.c.f. of helium and should the seller be required to tender in excess of $3.00 per m.c.f. in satisfaction or settlement of claims, the United States agreed to reimburse the seller for all sums in excess thereof. We pertinently stated, in footnote 2:

> A March 5, 1962, memo by the U.S. General Accounting Office regarding negotiations of helium contracts contains this statement: "Mr. Wheeler [Assistant Director, Helium, Bureau of Mines] advised that in cost negotiations, the contractors were allowed, as part of the unit price, a helium payment of about

> $2.00 a thousand cubic feet (MCF) of helium delivered because the natural gas companies believed that they could not warrant clear and unrestricted title to the helium. The companies contended that the gas rights owned permitted them to sell natural gas and not helium. *Therefore, in order to provide for possible future payments to lessees, the companies insisted upon a helium payment of* $2.00 *a MCF for helium delivered.* Although there has not been any known cases on this subject, Mr. Wheeler stated that, in essence, this payment provides for a *contingency* in the event that (1) the companies are sued by lessees, (2) the court renders a decision that the companies do not have clear title to the helium contained in natural gas and (3) the companies are liable to third parties for the helium extracted from natural gas (Over the life of the four negotiated contracts, this helium payment will amount to an estimated $125 million.)" [Emphasis supplied].
>
> 441 F.2d at pp. 709, 710.

In *Ashland I, supra,* this court also held that, absent specific reservations, the grant of gas by the subject leases covered all components of the gas, including helium which would entitle the landowners-lessors to one-eighth (1/8th) of the proceeds of the helium marketed from each well ". . . if sold at the well, or, if marketed by lessee off the leased premises, then, one-eighth (1/8) of the market value thereof at the well. . ." That *Ashland I* considered and settled the right and interest of the lessors and lessees to the value of helium was confirmed in our opinion in *Ashland II*:

> Our opinion in the *Consolidated Helium Cases* (*Ashland I*) requires that this division be in accordance with the lease terms and thus the same division as

> applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with direction to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the share of production, or payment for shares of production, if such be applicable.
>
> 554 F.2d at p. 392.

The United States, in its opening brief, pointed to a number of contracts entered into between the United States and private companies for the purchase of natural gas for processing, with various provisions relating to the value of extracted helium. Significantly, the United States pointed to these prices it paid under contracts for extracted helium: $2.00 per m.c.f. to Colorado Interstate Gas Company under a 1958 contract; between $1.55 to $2.99 per m.c.f. for helium extracted at the Government's Shiprock, New Mexico, plant; $1.55 per m.c.f. to Stanolind Oil and Gas Company under a 1955 contract; $2.00 m.c.f. to Pan American Production Company under a 1959 contract; and $2.00 m.c.f. to Continental Oil Company under a 1962 contract. [Brief of United States, pp. 14-16]. This section of the Government's brief concludes with this statement: "The United States has never paid more than $2.35 per mcf for the helium constituent of natural gas processed at any of its plants, including shrinkage, except the judicially determined value of $2.99 per mcf at the Shiprock Plant." [Brief of United States, p. 16].

We have heretofore observed that the United States, in its contracts with the Helex companies, included in the build-up of the price it paid for crude helium the sum of ". . . $2 per Mcf for helium 'contained in the natural gas delivered at the extraction plant for processing.' " *Grounds*

I, 441 F.2d at p. 717. Following this observation, we pointedly stated that we express no opinion what the *actual value* of the contained helium is, except that the helium value in the volumes of natural gas processed in the plants results in a price substantially higher than the FPC service rate. 441 F.2d at p. 717. The Kansas district court recognized the Government's agreement to pay the $2.00 per m.c.f. in its 1958 contract with Colorado Interstate Gas Company at the Keyes plant. 292 F.Supp. at p. 669-772.

The $2.00 per m.c.f. was, as between the United States and the Helex Group, understood to be the floor, the minimum to which the lessee-producers and landowners were entitled. Thus, we hold that it is money had and received by the Helex companies for the use and benefit of the landowners and lessee-producers as the minimum of their entitlement. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Atlantic Coast Line Railroad Co. v. Florida*, 295 U.S. 301 (1935). There is no room for doubt, in our view, that the contracting parties intended that third persons should receive the benefit of the $2.00 per m.c.f. as the *minimum* entitlement. In determining whether a third party has a beneficial interest in a contract which will entitle him to sue thereon, the intent to benefit the third party is generally controlling and it is to be gathered from a construction of the contract in the light of all surrounding circumstances showing such an obligation. *Jett v. Phillips & Associates*, 439 F.2d 987 (10th Cir. 1971), *Cox v. Fremont County Public Building Authority*, 415 F.2d 882 (10th Cir. 1969); *Corn Construction Co. v. Aetna Casualty and Surety Co. of Hartford*, 295 F.2d 685 (10th Cir. 1961); *Hamill v. Maryland Cas. Co.*, 209 F.2d 338 (10th Cir. 1954).

The District Court did not directly address the legal significance of the $2.00 per m.c.f. payment by the United

States to the Helex companies. The Court did, however, reject the contention of lessee-producers that the provisions in the conservation contracts relating to indemnification by the United States to the Helex companies for crude helium payments beyond $3.00 per m.c.f. were "open ended" in that they would allow unlimited escalation of the price to be paid by the United States. The court found that these provisions, *i.e.*, indemnification by the United States to the Helex companies for sums beyond ". . . an approximate $3.00 per mcf title liability exposure limit, continue to be just that—indemnity arrangements between the Helex group and the United States, which inure solely to the benefit of the Helex group and not to third parties. The court has therefore determined that any indemnity arrangements which exist between the government and the Helex group are irrelevant to the question of determining 'reasonable value' of the commingled helium in question." [R., Supp. Vol. I, p. 65]. While we agree that the indemnity arrangement is not relevant to determination of the reasonable value of commingled helium, we must respectfully hold that the court erred in finding that provisos relating to sums beyond the $3.00 per m.c.f. "title liability exposure limit" were not inserted in the contracts for the benefit of third parties. Clearly, there was no other reason for their insertion. When the United States and the Helex companies contracted they were fully aware that the "postponed" knotty legal problems of title and accounting would, of certainty, confront them. It was in this precise setting that the $2.00 per m.c.f. "floor" was established with further provision for assumption of "the risk" of payments to third party claimants for royalties attributable to the value of helium beyond $3.00 per m.c.f.

In *Grounds I, supra,* this court considered contract price provisions in contracts between the United States

and pipeline companies relating to volumes of contained helium following the 1960 Helium Act amendments. We referred to initial fixed prices per m.c.f. under each contract "all subject to escalation" in that in arriving at the unit prices in the Helex [companies] contracts the United States negotiated on the basis of costs comparable to those it would incur in a government-owned plant; further, included in the cost "build up" was the payment of $2.00 per m.c.f. for helium "contained in natural gas delivered at the extraction plant for processing." *Grounds I*, 441 F.2d at p. 717.

It is our view that the cost build up established that the $2.00 per m.c.f. helium payment is as applicable at the wellhead as it is at plant inlet, inasmuch as the build-up contains another provision for "shrinkage" which included all of the costs incurred by the Helex companies between the wellhead and the plant inlet. The United States calculated the "shrinkage" over the life of each contract on a total dollar basis. These payments are not claimed by the lessee-producers. They point out, however, that their importance (the "shrinkage" payments) is in that they establish that there is no relationship between the "shrinkage" payments and the $2.00 per m.c.f. helium payment, which is over and above *all costs* upstream; and, accordingly, the $2.00 per m.c.f. payment is as applicable at the wellhead as at the plant inlet. We agree. This contention is bolstered by the evidence that in the cost "build-up" the helium payments were increased beyond the $2.00 per m.c.f. in order to relate them to the volume of crude helium at the plant outlets. This was accomplished by dividing the $2.00 by a plant efficiency factor which was less than 100%—no plant being that efficient. This process increased the helium payments made by the United States to an average of $2.38 per m.c.f. Thus, the evidence is that the Helex companies have received from the United States,

through the cost "build up" factoring, an amount in excess of $2.00 per m.c.f. over and above their costs and a reasonable profit.

The United States, in its brief filed with this court in the consolidated appeals leading to *Ashland II, supra,* criticized our opinion in *Grounds I,* 441 F.2d at pp. 721, 722, wherein we rejected the Helex companies' contention that because the lessee-producers did not assume any of the risks in the construction of multi-million dollar extraction plants, they are not entitled to any payment representing the reasonable value of the helium. The United States urged us to reverse our *Grounds I* opinion to the extent that it required additional payments for commingled helium arising from the gas sales contracts. [Brief of United States, pp. 29-31]. We declined the invitation.

In *Grounds I, supra,* we made it abundantly clear that a reconciliation of the Natural Gas Act and the 1960 amendments to the Helium Act required the conclusion that FPC service rates do not apply to the subject contracts so as to deny the lessee-producers and landowners recovery for the contained helium which is processed in the Helex companies' separation plants:

> Hence, the lessee-producers recover from the fund the reasonable value of the helium content of the processed gas and they in turn must pay royalty thereon to the landowners. We believe that this result is a valid reconciliation of the statutes and a proper determination of the rights of the parties.
>
> 441 F.2d at p. 723.

In *Grounds I, supra,* we had earlier observed that if the lessee-producers must deliver the gas at the FPC service rate, based on fuel value, and thus receive nothing for the

helium value, this would result in a ". . . windfall for the pipelines and their Helex subsidiaries." 441 F.2d at p. 722.

In its supplemental brief, the *Helex Group* argue that "the fact the government used $2.00 in its work-up does not constitute an admission binding upon the Helex Companies in Grounds II that $2.00 is a comparable value for commingled helium at the extraction inlet" and "the fact of the matter is that a $2.00 figure for contained helium has been bandied about in several different instances in connection with the value of the helium." [Supp. Brief of Helex Group, p. 9]. These statements, in our view, do not address the issue: the parties did, in contracting, recognize limits of liabilities which were certain to arise at a future date and the parties negotiated those limits.

In *Ashland I,* we observed:

> It is apparent that under the contractual arrangement, the United States undertook to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natural gas above a certain figure. This is in the nature of an indemnity agreement and the contract contains qualifications and limitations not here concerned. The United States is liable for some of the additional amounts which Phillips will have to pay. The Government has thus entered the litigation to assert its own position and interest under the contract . . . It [the United States] directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. *The United States, again by contract, sought to handle these problems by providing*

for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognized by its intervention. [Emphasis supplied].

554 F.2d at p. 390.

Senate Report No. 1814 of June 30, 1960, to accompany H.R. 10548, Helium Act Amendments of 1960, demonstrates the Government's sense of urgency and commitment to an effective, long-range program for the production and storage of helium to assure Government needs essential to our missile and atomic energy programs and needs of the Department of Defense, the Atomic Energy Commission, the National Aeronautics and Space Administration, and other Federal agencies. The report contains the following:

> The measure provides essentially for a conservation program and envisions the possible construction of up to 12 new plants located on helium-bearing gas pipelines to extract the helium that would otherwise be wasted from the gas before the combustible gas goes to fuel markets. The helium extracted would then be stored underground in the Government-owned Cliffside gasfield near Amarillo, Tex., until needed in the future . . . The legislation would provide for industry being invited to participate in the program by financing, building and operating plants to separate helium from natural gas, with the helium then being purchased and conserved by the Government . . . The legislation would provide new legal authority to make such participation by industry possible, which cannot be done under present statutes. *The long-term contracts contemplated under this Act would make it feasible for private industry to negotiate with banks and other financial institutions for the capital necessary to build separation plants. If, however, private*

> *industry should not indicate a willingness and capability to perform as a helium producer in a reasonable time, the Government could undertake the program as a Government operation.* . . . The authority given to the Secretary of the Interior by H.R. 10548 is therefore not limited to the implementation of this specific program presented by the Department of the Interior. It is necessarily broad and general. . . [Emphasis supplied].
>
> S. REP. No. 1814, 86th Cong., 2nd Sess. 2 (1960), U. S. CODE CONG. & AD., NEWS, 86th Cong., 2nd Sess., Vol. 2, pp. 3597, 3598.

Thus, we hold that $2.00 per m.c.f. is the "floor", *the minimum* to which the lessee-producers and landowners are entitled.

IV.

The District Court ordered that the Helex companies pay unto the registry of the court on an annual basis to the nearest accounting date to January 1, 1972, ". . . to the Lessee-Producers and the members of the respective classes which they represent, as their interests may appear, the reasonable value of the helium as described herein, together with interest thereon as the rate of six per cent (6%) per annum from the end of each year to the date of this judgment and at a rate of eight per cent (8%) thereafter on the total of said principal amounts and said prejudgment interest thereon, until such sums are paid into the registry of the Court." [R., Supp. Vol. I, p. 99].

In *Ashland I, supra,* this court held that the lessee-producers are entitled to prejudgment interest. We recognized the discretion vested in the trial court in calculating and awarding such interest, *citing to Royal Indemnity Co. v.*

United States, 313 U.S. 289 (1941) and *St. Paul Mercury Indemnity Co. v. United States*, 201 F.2d 57 (10th Cir. 1952). We hold that the trial court did not abuse its discretion in the award of prejudgment interest. Here, the liability was determined and the exact time frames were fixed during which the claims were liquidated. *Milgo Electronic Corporation v. United Business Communications, Inc.*, 623 F.2d 645 (10th Cir. 1980), *cert. denied*, ... U.S. .....; *Bruegger v. National Old Line Insurance Company*, 529 F.2d 869 (10th Cir. 1976). The denial of prejudgment interest has been termed a "handsome method" of avoiding the payment of interest on one's debts. *Bruegger, supra*, at p. 870. Here, the District Court properly found liability. Even though the judgment must be set aside for new trial on the ultimate dollar liability issue by employment of the "work back" method of valuation of the helium, the amounts due are sufficiently certain to qualify as a liquidated claim. *Seneca Nursing Home v. Secretary, Etc.*, 604 F.2d 1309 (10th Cir. 1979). This is particularly applicable here in light of our holding that the $2.00 per m.c.f. was, per contract, the agreed "floor" or minimum dollar liability and the United States and the Helex companies recognized further "contingent" dollar liabilities in claims certainly to be advanced by third parties. The unusual posture of the "taking" mandates the award of prejudgment interest on the liability to be fixed by the trial court's judgment on remand.

We expressly affirmed the award of prejudgment interest under almost identical facts and circumstances in *Ashland I, supra*. The liquidated amount doctrine does not apply to the circumstances involved in the case at bar. This is not a typical tort claim action. Prejudgment interest is contemplated where the damage awards are certain or capable of being made certain by calculation. *Jesko*

v. American-First Title & Trust Company, 603 F.2d 815 (10th Cir. 1979); *Liberty National Bank & Trust Co. v. Acme Tool Division,* 540 F.2d 1375 (10th Cir. 1976). Further, we made it clear in *Ashland I, supra,* that the trial court in that case "acted within its discretion under *federal law* in the allowance of prejudgment interest." 554 F.2d at p. 392. [Emphasis supplied]. Such was predicated on our determination that in that action, as here, *Erie v. Tompkins,* 304 U.S. 64 (1938) does not apply so as to mandate, in diversity based action, that federal courts apply the law of the state where the cause of action arose. We held, instead, that because the liabilities identified in *Ashland I,* just as here, are primarily those of the United States, the desirability for a uniform rule in similar actions brought in other states is plain. Thus, we applied the rule laid down in *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), *i.e.,* where the rights and duties of the United States are primary and involve transactions occurring in several states, the application of state law would subject the rights and duties of the United States to uncertainties, leading to possible diverse results involving identical transactions. We recognized that the federal court, however, may apply state doctrines or parts of them as "federal law". 544 F.2d at p. 391.

The District Court did not award attorneys' fees and costs. The court reserved the matter in that the court ". . . clearly contemplates that new applications for allowance of fees and costs will be filed after appellate review is concluded in these cases." [Supp. Vol. I, p. 104]. We observe, however, that in *Ashland I,* we set aside the trial court's award of attorney fees in that we ". . . are unable to find any statutory provision for them or any rule of practice which would authorize such fees." 554 F.2d at p. 392.

ORDER

Thus, the judgment of the trial court is set aside as to the valuation determination. On remand, the trial court shall undertake such further proceedings deemed necessary to enter judgment based upon the value less expense or work-back valuation, subject to the $2.00 per m.c.f. "floor" or minimum payments to which the lessee-producers and landowners are entitled as set forth in Part III of this opinion. The District Court may undertake such other proceedings deemed proper in the light of this opinion. Each party shall bear its own costs on this appeal.

APPENDIX B

Opinion of the United States District Court for the District of Kansas, Dated November 12, 1974 (393 F.Supp. 949)

NORTHERN NATURAL GAS COMPANY et al.,
Plaintiffs,

v.

Ralph GROUNDS and Henry Hitch, Jr.
et al., Defendants.

CITIES SERVICE GAS COMPANY et al.,
Plaintiffs,

v.

MOBIL OIL CORPORATION et al.,
Defendants.

CITIES SERVICE GAS COMPANY et al.,
Plaintiffs,

v.

ASHLAND OIL AND REFINING COMPANY
et al., Plaintiffs.

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

v.

COLUMBIAN FUEL CORPORATION
et al., Defendants.

CITIES SERVICE GAS COMPANY et al.,
Plaintiffs,

v.

PAN AMERICAN PETROLEUM CORPORATION
et al., Defendants.

NATIONAL HELIUM CORPORATION,
Plaintiff,

v.

PANHANDLE EASTERN PIPE LINE
COMPANY et al., Defendants.

Civ. A. Nos. KC-1969, KC-1945—KC-1948
and KC-1980.
United States District Court,
D. Kansas.

Nov. 12, 1974.

Eight actions, including six in nature of interpleader, were brought by pipeline companies, helium extraction companies and landowners to determine title to and rights in crude helium which had been extracted from natural gas stream and sold to the United States pursuant to conservation contracts. The United States District Court for the District of Kansas, 292 F.Supp. 619, rejected claims of landowners and lessee producers, and appeals were taken. The Court of Appeals, 441 F.2d 704, held that lessee producers were entitled to compensation for reasonable value of helium contained in the natural gas stream and, in turn, were required to pay royalties thereon to the landowners, and remanded interpleader cases for determination of reasonable value of the helium. On remand, the District Court, Wesley E. Brown, Chief Judge, determined reasonable value and held that any indemnity agreements between the government and the extraction group were irrelevant to the value issue, that those lessee producers who delivered helium bearing natural gas directly or indirectly to one of the parent pipeline companies pursuant to gas exchange agreement were entitled to share in the fund, that one pipeline company, which was also producer lessee, was entitled to share in fund, that pro-

ducers who retained right to extract helium were entitled to share in the fund, that one producer, which had released pipeline company from any and all claims, was also entitled to share in fund, that royalty of 50% was a reasonable measure of landowners' contribution and that 6% prejudgment interest was appropriate.

Claims adjudicated.

1. Gas (Key) 14.1(3)

The "proceeds less expense" approach was rejected as a method for determining value of crude helium extracted from natural gas stream and sold to United States pursuant to conservation contracts since not only was basis for such approach, i. e., want of comparable sales of commingled helium at the wellhead, unfounded but result of such method would be that the government's total payment would exceed the value set for Grade A helium as a starting point in the computation and such theory was simply unreasonable in that value of "raw materials" is not determined on such theory in the American economy. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

2. Courts (Key) 328.4(4)

Basis of district court's jurisdiction in interpleader is determined by, and limited to, the "fund."

3. Contracts (Key) 187(1)

Gas (Key) 14.1(3)

Provisions in helium conservation contracts for indemnification by the United States for sums beyond an approximate $3 per Mcf title liability exposure limit were merely indemnity agreements between the government and the extraction companies, which provisions inured solely

to benefit of the extraction group and not to any third parties; such indemnity arrangements were irrelevant to determination of "reasonable value" of commingled helium for purpose of determining landowners' and lessee producers' share of money paid by the United States for crude helium purchased from the extraction group. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

4. Gas (Key) 14.1(3)

Question of "value" of crude helium, which has been extracted from natural gas stream and sold to United States pursuant to helium conservation contracts, was not to be computed by determination of what the profits and rate of return to the extraction companies and/or lessee producers "ought to be," since district court, in determining lessee producers' and landowners' share of fund consisting of government's payments for the helium, was not to assume rate-making jurisdiction over the private helium industry. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

5. Gas (Key) 14.1(3)

Reasonable value of crude helium extracted from natural gas streams and sold to the United States pursuant to helium conservation program was not to be determined according to existing gas purchase contracts between lessee producers of natural gas and the pipeline companies. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i; Natural Gas Act, § 1 et seq. as amended 15 U.S.C.A. § 717 et seq.

6. Gas (Key) 14.1(3)

Reasonable value of helium component of helium bearing natural gas, at point that it was delivered by lessee producers to pipeline companies, with helium being there-

after processed and extracted and sold to the United States pursuant to conservation contract, set forth. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

7. Gas (Key) 14.1(3)

Since helium extraction companies were required to account for all helium which was extracted in their plants and thereafter sold to the United States pursuant to conservation contracts, the extraction companies were not accountable for helium bearing natural gas which was bypassed around their plants or for helium bearing natural gas which was consumed as fuel within the plant or for helium which was extracted and vented into the atmosphere, or for helium which was extracted and sold to parties other than United States, or for helium which was extracted and then stored for their private account. Natural Gas Act, § 1 et seq. as amended 15 U.S.C.A. § 717 et seq.; Helium Act amendments of 1960, § 11, 50 U.S.C.A. § 167i.

8. Gas (Key) 14.1(3)

Where portion of lessee producer's natural gas production was processed at helium extraction plant, helium was extracted from such gas and thereafter sold to the United States pursuant to conservation contract, the producer was within the class of lessee producers who delivered "helium contained in gaseous streams directly or indirectly" to natural gas company, from which gas the helium was removed and delivered into possession of the government pursuant to conservation contracts. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

9. Gas (Key) 14.1(3)

Since helium extraction companies were required to account for all helium which was extracted in their plants

and thereafter sold to the United States under conservation contracts, helium extractor was required to account to lessee producer only for that portion of natural gas which passed through its extraction plant and was sold to the government; lessee producer was not entitled to any payment for helium content of that gas which was diverted to and processed in extraction plants having no contract with the government or for gas which may have been used as fuel in compressor stations. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

10. Gas (Key) 14.1(3)

Mines and Minerals (Key) 79.1(3)

Where large volume of natural gas serving pipeline's helium extraction plant was obtained through gas exchange agreements, which agreements apparently were for convenience and without any particular profit motive, and helium was extracted from such gas and sold to the United States pursuant to conservation contracts, those lessee producers who delivered helium bearing natural gas directly or indirectly to pipeline company, pursuant to exchange agreements, were entitled to share in fund derived from sales to the government of crude helium extracted from the exchanged gas and, in turn, were to account and pay proper royalties to landowners. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

11. Gas (Key) 14.1(3)

Mines and Minerals (Key) 79.1(3)

Pipeline company, as a lessee producer supplying natural gas which found its way through pipeline company's helium extraction plant, was within the class of lessee producers entitled to share in fund derived from sales of crude helium by the extractor to the United States

pursuant to conservation contract; in turn, pipeline company was to make proper accounting for royalties due with landowners for value of the extracted helium. Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

12. Gas (Key) 14.1(3)

Although certain lessee producers sold natural gas to pipeline company under contracts in which they retained right to extract helium content and waived claim to helium or promised indemnity in event they failed to exercise their option, such producers were entitled to share in allocation of fund derived from sales of crude helium to the United States by pipeline company's extraction company pursuant to conservation contracts, since oil and gas leases and gas purchase contracts conveyed title to the helium constituent of the natural gas streams to the extraction companies, which had received a valuable commodity without paying for it. Natural Gas Act, § 1 et seq. as amended 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

13. Release (Key) 38

Although natural gas producer, in settlement of dispute with pipeline company over gas purchase contracts, released pipeline company and others from any and all claims which the producer might have "from the beginning of the world" up to the date of release, release did not bar producer from sharing in allocation of funds derived from sales of crude helium to United States by pipeline's subsidiary helium extraction company pursuant to conservation contracts, which helium had been extracted from natural gas obtained from producer. Natural Gas Act, § 1 et seq. as amended 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

14. Gas (Key) 14.1(3)

In allocating fund derived from sales of crude helium to United States by subsidiary helium extraction companies pursuant to conservation program the parent pipeline companies were not entitled to a set-off against sums owing lessee producers for amounts attributable to volumetric measure of helium contained in natural gas stream; prices paid by pipeline companies under gas purchase contracts for the whole gas stream were irrelevant to determination of liability of extracting companies for reasonable value of the helium since not only were extractors and pipeline companies theoretically separate entities but pipeline companies had obtained title to all the components of the natural gas stream on payment of rates specified in gas purchase contracts or as determined by Federal Power Commission area rates. Natural Gas Act, § 1 et seq. as amended 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

15. Mines and Minerals (Key) 79.3

In determining lessee producers' and lessor landowners' share of fund derived from sale of crude helium to the United States pursuant to conservation program, the value of the helium, which was extracted from natural gas stream, was to be determined by multiplying the yearly volume of helium delivered at each delivery point by each lessee producer and subsequently sold, as shown by computer runs, times the value of commingled helium. Natural Gas Act, § 1 et seq. as amended 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

16. Mines and Minerals (Key) 79.3

In absence of evidence that there were appreciable additional producers costs attributable to value of subject

helium, which was extracted from natural gas stream and sold to the United States under conservation contracts, a royalty of 50% of the reasonable value of the helium content of the gas at time and point it was delivered to pipeline companies, which owned the extraction companies, was a reasonable measure of the respective contribution of the landowners lessors; helium wellhead values were attributable to two factors: (1) existence of underground deposits of helium and (2) the leasehold production of it. Natural Gas Act, § 1 et seq. as amended 15 U.S. C.A. § 717 et seq.; Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

17. Interest (Key) 39(2)

Award of prejudgment interest was appropriate in interpleader action involving title to, and rights in commingled helium, which had been extracted from natural gas stream and sold to United States pursuant to conservation contracts; prejudgment interest would be at rate of 6% but 8% rate would apply to total of principal amounts and prejudgment interest thereon from entry of judgment until such sums were paid into the registry of court. Natural Gas Act, § 1 et seq. as amended 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 11, 50 U.S.C.A. § 167i.

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Emmet A. Blaes, of Jochems Sargent & Blaes, Wichita, Kan., for National Helium Corp. and Panhandle Eastern Pipe Line Co.

Richard Jones, of Hershberger, Patterson & Jones, Wichita, Kan., for Mapco Production Co., Mobil Oil Corp. and Superior Oil Co.

Gerald Sawatzky, of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., for Cabot Corp., Ashland Oil & Refining Co., Dorchester Gas Producing Co., Helmerich & Payne, Inc. and Texaco, Inc

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Stanford J. Smith, of McMaster & Smith, Wichita, Kan., for Cities Service Oil Co.

Joseph Kennedy, of Morris, Laing, Evans, Brock & Kennedy, Wichita, Kan., for Phillips Petroleum Co.

Daniel R. Hopkins and Wm. J. Sears, Oklahoma City, Okl., for Cities Service Cryogenics, Inc., Cities Service Helex, Inc. and Cities Service Gas Co.

George B. Collins, of Collins & Collins, Wichita, Kan., for Diamond Shamrock Corp.

Wm. F. Pielsticker, Wichita, Kan., James B. Diggs, Oklahoma City, Okl., for Gulf Oil Corp.

H. O. Hickman and R. H. Landt, Denver, Colo., for Amoco Production Co.

Don Jemison, Bartlesville, Okl., for Phillips Petroleum Co.

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William H. Tabb and Donald G. Canuteson, Dallas, Tex., for Mobil Oil Corp.

W. M. Sutton and H. A. Berry, of Underwood, Wilson, Sutton, Heare & Berry, Amarillo, Tex., for Diamond Shamrock Corp.

Phillip R. Wimbish and Elmer W. Adams, Tulsa, Okl., for Texaco, Inc.

E. L. Creasey and Sam Riggs, Jr., Tulsa, Okl., for Cities Service Oil Co.

Eugene G. Bell, Tulsa, Okla., for Mapco Production Co.

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R. T. Robberson, Houston, Tex., for Superior Oil Co.

C. A. Conoley, Kansas City, Mo., for National Helium Corp., Panhandle Eastern Pipe Line Co.

J. M. O'Loughlin, Houston, Tex., for Ashland Oil & Refining Co.

James R. Coffee and William J. Bonner, Dallas, Tex., for Atlantic Richfield.

MEMORANDUM OF OPINION FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND

WESLEY E. BROWN, Chief Judge.

A. *Statement of the Case.*

This is a continuation of six consolidated interpleader actions filed in 1963, involving title to, and rights in the commodity or element known as "helium," which are reported as Northern Natural Gas Company v. Grounds, D.C., 292 F. Supp. 619, and Northern Natural Gas Company, et al. v. Grounds, 10 Cir., 441 F.2d 704 (1971), cert. den., 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267; 404 U.S. 1063, 92 S.Ct. 732, 30 L.Ed.2d 751; 404 U.S. 1065, 92 S.Ct. 732, 30 L.Ed.2d 754. The first trial of these actions, had in October 23, 1967—January 5, 1968, involved the ownership of helium contained in or extracted from natural gas produced from wells drilled in the Hugoton gas areas of Kansas, Oklahoma, and Texas. Further description of issues involved in these interpleader actions may be found in the reported decisions, *supra*, and will not be repeated except insofar

as it may be necessary for discussion of issues which remain after remand to this court.

At the first trial, it was found that the Landowners did convey to their lessees all rights and title to helium contained in the natural gas stream, except those rights specifically reserved. It was further found that the Lessee-Producers, who sold and delivered gas to pipeline company purchasers, pursuant to gas purchase contracts, had likewise conveyed title to the helium component of the natural gas stream, and that the plaintiffs in interpleader, the helium extracting companies, or "Helex group" had title to the helium component of the natural gas stream. Northern Natural Gas Company v. Grounds, 292 F.Supp. 619, at 686-687.

On appeal, the Court of Appeals sustained these findings, ruling that, absent specific reservations, the grant of "gas" by the Landowners in their leases effectively conveyed all components of the natural gas stream, including helium, and that the gas sales contracts between the Lessee-Producers and the pipeline companies, likewise conveyed all components of the natural gas stream, including helium.[1]

On appeal from this court's determination that § 11 of the Helium Act Amendments, 50 U.S.C. § 167i, did not alter the scope of the gas purchase contracts, so as to allow the Lessee-Producers to share in revenues derived by the Helex companies from their sales of helium to the

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1. This finding effectively disposed of two additional consolidated actions brought by landowners against the United States. (Nos. W-3009 and W-3159) These cases, brought under the Federal Tort Claims Act on the theory of conversion, and under the Tucker Act, 28 U.S.C. § 1346(a)(2) on the theory of "reverse condemnation," depended upon the premise that the landowners had not parted with title to the helium. See Northern Natural Gas Company v. Grounds, 441 F.2d 704, at 715.

government, the Lessee-Producers successfully persuaded the Court of Appeals that they were entitled to compensation for the reasonable value of helium contained in the natural gas stream. The appellate court felt that the producers fell into a "void" between FPC regulated gas purchase contracts and the helium legislation regulated by the Bureau of Mines: (441 F.2d at 722-723):

> Neither the FPC nor the Bureau of Mines has jurisdiction over the helium value of the natural gas. Although the gas purchase contracts have not been abrogated, the price provisions thereof have been superseded by FPC rate regulation. The regulated lessee-producers must continue to sell the dedicated gas and have no statutory or contractual method of obtaining any benefit for the increased value. Two results are possible. The first is that the lessee-producers must deliver the gas at the FPC service rate, based on fuel value, and receive nothing for the helium value. *This produces a windfall for the pipelines and their Helex subsidiaries.* The second is that the lessee-producers are entitled to the reasonable value of the contained helium. This means that the landowners will receive royalties on the value of the helium produced from their lands and the lessee-producers will receive value for the helium content of the natural gas which has been produced by their efforts. We believe that satisfactory utility regulation requires the second result. Otherwise a utility rate may be used to obtain a commodity or service which is not within the contemplation of that rate. (Emphasis supplied.)
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> * * *
>
> In our opinion the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the con-

clusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants. Hence, the lessee-producers recover from the fund the reasonable value of the helium content of the processed gas and they in turn must pay royalty thereon to the landowners. We believe that this result is a valid reconciliation of the statutes and a proper determination of the rights of the parties.

The Court of Appeals remanded the interpleader cases, with instructions that this court determine the reasonable value of the helium in question, which determination would be subject to review by the Court of Appeals.

B. *Proceedings on Remand.*

After remand, the motion of the United States for leave to intervene as party plaintiff was sustained. [Dkt. 1410, 1429.] The United States is not a party defendant in any respect, and appears in these proceedings on remand solely for the purpose of attempting to prove that the reasonable value of the helium content of the natural gas processed in the helex plants is nominal. [Dkt. 1446, Complaint in Intervention.][2]

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2. The United States and Cities Service Helex, Inc. entered into the following stipulation, Dkt. 1653:

"The matter of indemnification by the United States of Cities Service Helex, Inc. for any payment of third party claims to helium in the Hugoton Area gas, as provided in Article 7.4 of the contract between the United States and the Cities Service Helex, Inc., dated August 22, 1961, is not in issue in this action. It is agreed that if Cities Service Helex, Inc. should hereafter seek indemnification against the United States under said contract, the United States agrees not to plead that such indemnification is barred by failure to raise the matter in this action.

The parties, by entering into this Stipulation, do not intend that it be used to assist or restrict either party in the presentation of any defenses to the cause of action litigated herein."

Atlantic Richfield Company, a lessee-producer, was also granted leave to intervene in these interpleader actions for the purpose of establishing its claim to a portion of the interpleaded funds. This claim is based upon alleged delivery of helium bearing natural gas which was ultimately processed for extraction by Northern Helex Company. The claim of Atlantic Richfield is designed to determine the status of those lessee-producers whose helium bearing natural gas was sold to others, but ultimately found its way into the conservation extracting plants by means of certain gas-exchange agreements between the pipeline companies and others.[3] [Dkts. 1592, 1601, 1609, 1610.]

Prior to trial on remand, this Court also made a determination that Phillips Petroleum Company was a member of the lessee-producer classes in Cases No. KC-1969 and KC-1980: [Dkt. 1614.]

. . . in view of the Mandate from the Court of Appeals, this Court can only conclude that Phillips remains in Cases Nos. KC-1969 and KC-1980 as a member of the class of lessee-producers, insofar as it may have delivered helium contained in gaseous streams to Northern Natural Gas Company (KC-1969) and Panhandle Eastern Pipe Line Company (KC-1980). Its right to share in any ultimate distribution from the interpleaded fund will of course depend upon the nature of its contractual arrangements with these two helex processing companies, and may very well require that the Court establish 'sub-classes' of lessee-

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3. E. g., Atlantic Richfield gas, though sold to El Paso Natural Gas Company, was delivered into Northern's pipeline system for subsequent helium extraction at Northern's Bushton plant, as the result of a gas exchange agreement between El Paso and Northern.

The gas delivered by Northern to El Paso in exchange for Atlantic Richfield gas was taken from a portion of Northern's pipeline system which does not serve as a source for the helium plant.

producers in the process of making an allocation of any distribution from the fund which is ultimately ordered.

The plaintiffs in interpleader, the Helex group, filed Motions for Summary Judgment [Dkt. 1659] in these actions, upon the basis of the decision of the Supreme Court in Phillips Petroleum Company v. Texaco, 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209, which reversed a decision of the Tenth Circuit, Texaco Inc. v. Phillips Petroleum Company (1973), 481 F.2d 70, to the effect that its opinion on the liability issue in these cases, Northern Natural Gas Company v. Grounds, *supra*, 441 F.2d 704, established that problems relating to recovery of the value of helium raise federal questions, sufficient to establish jurisdiction under 28 U.S.C. § 1331(a).[4] In finding that there was no "federal question" jurisdiction in *Phillips*, the Supreme Court made the following observation regarding *Grounds*, 415 U.S. at p. 128, 94 S.Ct. at p. 1004, 39 L.Ed.2d at pp. 212-213:

> In other words, the Grounds case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium. In short, the federal statutory provisions do not under Grounds create a federal right of recovery, but only preclude the inter-position of a plea of payment to defeat a quasi-contractual suit for the value of the helium.

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4. 481 F.2d 70, at pp. 72, 73, in referring to the remand of this case, the Court stated:

> "We thought that we made plain that we did not allow recovery on the application of any principles of equity . . . but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate."

In view of the fact that jurisdiction in this instance depends upon the interpleaded fund, and in view of the Mandate from the Court of Appeals, the Court overruled the motions for summary judgment. [Dkt. 1687.]

Considerable difficulty was had by court and counsel in interpreting the opinion of the appellate court, and in determining what issues remained for trial in this district court. Despite numerous conferences, counsel was unable to agree upon a pre-trial order, and on January 9, 1974, one was prepared and filed by the court. [Dkt. 1612.]

It was determined that the mandate from the Court of Appeals consisted of a judgment entered by that Court on March 2, 1971, the opinion of that court filed March 2, 1971, reported at 441 F.2d 704, and an order filed March 16, 1974 by that Court relating to costs.

In the order relating to costs on appeal, the Court ordered:

* * *

> 2. The interpleaded fund is the reasonable value at time of sale of the helium content of the natural gas which the Helex group has received from the lessee-producers and which has been processed in the plants of the Helex group for the separation of helium from natural gas. We leave to the trial court the determination of the time of sale, the points of delivery, and the method of measurement. Such determination shall be subject to review by this Court.
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> * * *
>
> 14. This Order covers only costs in the Court of Appeals. District Court costs shall be determined by the District Court, subject to review by this Court.

15. The right of the lessee-producers to interest, and the amount thereof, on any sums which the District Court may adjudge to be due and owing to them shall be determined by the District Court, subject to review by this Court.

a) A determination of the "reasonable value" at time of sale of the helium content of the natural gas processed at the Helex plants;

b) Whether or not the helex companies were accountable in these actions for helium extracted and stored, or extracted and sold privately, or extracted and delivered to the United States, but not paid for, or extracted and vented because of the refusal of the United States to accept further deliveries;

c) The proper basis for allocating payments for helium among the lessee-producer class;

d) The question of whether or not lessee-producers were entitled to interest on any sums awarded for the value of helium, and if so, at what rate, and from what date;

e) A determination of the proper basis for computing royalties which would accrue to the benefit of landowners.

In settling the pre-trial order, the court permitted the parties to attach as appendices to the order, statements concerning various other contended issues which each group believed to be of importance to this Court's action on remand. These appear as Appendix A through E in the pre-trial order.

C. *The Helium Extraction Process.*

Plaintiffs in these interpleader actions are: Northern Natural Gas Company, an interstate pipeline company,

and its two wholly-owned subsidiaries, Northern Helex Corporation, and Northern Natural Gas Products Company;

Cities Service Gas Company, Cities Service Cryogenics, Inc., and Cities Service Helex, Inc. The latter two entities are wholly owned subsidiaries of Cities Service Company, which owns approximately 79% of the stock of Cities Service Gas Company; and

National Helium Corporation, which joined Panhandle Eastern Pipe Line Company as party defendant in Case No. KC-1980. Panhandle owns 50% of the stock of National Helium, and the remaining 50% is owned by National Chemical and Distillers Company.

The three helium extracting plants involved in these interpleader actions are the "Jayhawk Plant," operated by Cities Service Helex, Inc., at Ulysses, Kansas, which began extraction processes in June, 1963; the "Bushton Plant," operated by Northern Helex Co., at Bushton, Kansas, beginning December, 1962, and the "Liberal Plant," operated by National Helium Corporation, at Liberal, Kansas, beginning July, 1963. (U.S. Exh. 1). None of these plants are presently selling conservation helium to the Bureau of Mines due to cancellation of contracts by the United States. The United States—Helex Company contracts appear as L.P. Exhibits 2-3, 2-4, and 2-5.

Since the 1960 Helium Act Amendments, three private extracting plants have supplied significant quantities of helium to commercial markets. (U.S. Ex. 2). These are:

a) The "Otis Plant," owned by George A. Angle, d/b/a Kansas Refined Helium Company, at Otis, Kansas, which began operations in April, 1966;

b) The "Greenwood Plant," owned by Alamo Chemical Company, a subsidiary of Phillips Petroleum Company

and Gardner Cryogenics, at Elkhart, Kansas, which began operations in December 1966; and

c) The "Sunflower Plant," owned by Cities Service Cryogenics, Inc., a subsidiary of Cities Service Gas Company, and Helium, Inc., a subsidiary of Kansas-Nebraska Pipeline Company. This plant is located at Scott City, Kansas, and began operations in October, 1968.

The United States has no connection with any of these three private plants, and none are involved with sales of conservation helium, which is the subject matter of these actions. [Tr.2d 19:2191]

Prior to discussing the scope of evidence regarding "*reasonable value*" introduced at the second trial, it would be beneficial to briefly review the process of extracting helium and to set in context certain definitions of the various states of helium as it progresses through the extraction process.[5]

Helium occurs in nature as a constituent of natural gas, and natural gas which contains a significant percentage of helium is referred to as "helium bearing natural gas." The molecules of helium which are contained in this gas, are "pure" for helium is inert and will not combine chemically with any other element.

Since the helium in the gas is commingled with other constituents, it is referred to in testimony, and in these findings as "commingled helium." Commingled helium is what is produced from the natural gas wells and delivered by the Lessee-Producers to the pipeline companies. The helium transported by the pipeline companies to the helex plants is contained in the natural gas stream,

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5. PEPLX 120 is a diagram illustrating terminology applied to helium in various stages from well to markets. See also Wheeler 15:1534-1536.

and, as delivered to the helex companies, it is "commingled helium."

Some helium bearing natural gas which is delivered to the pipeline companies is not processed through helium extracting plants, and thus, some commingled helium is transmitted to fuel gas consumers without the helium first being extracted, and consequently, some commingled helium is wasted through vents from stoves and furnaces.

When helium bearing natural gas is delivered by the pipeline companies to a helex extracting plant, the commingled helium in that gas stream is extracted by a process which depends upon the fact that one property of helium is that it does not liquefy until it approaches a temperature nearing absolute zero, or -453° F. Although procedures differ slightly in the three helex plants, the general extracting process consists of drying and cooling the raw gas stream to successively lower temperatures in various stages by means of compressors, dehydrators, heat exchange plates, separators, "cold boxes," and other equipment, during which various hydrocarbons liquefy and drop out of the gas stream, leaving an "end product" which is sold to the United States as "crude helium." Thus, at the Northern helex plant, the whole gas stream is first cooled to about -30° F, at which point about 20% of the propane, 50% of the butane, 85% of the pentanes and 100% of the hexanes and heavier hydrocarbons elements are liquefied and removed. As temperatures are lowered further, all of the liquid hydrocarbons are "swept out" of the gas stream, until at -275° all liquids are extracted leaving a mixture of helium and other gases, mainly nitrogen, with a helium content of 60%-85%, generally around 70%.[6] This mixture is the commodity

6. Conservation contracts required that the contained helium in the crude mixture was to be not less than 60%. LPX 2-3.

known as "crude helium" which is sold to the United States by the helex companies, and delivered into government pipeline systems for storage at the Cliffside Field in Texas. The Bureau of Mines pays the helex companies only for the contained helium within this "crude helium" mixture. Thus, the $12.00 mcf price, which is used as a general reference figure of sums received from the Bureau of Mines by the helex companies, is applicable only to the 60%-85% portion of contained helium within the crude helium mixture delivered by the helex companies.

Helium can not be extracted from the natural gas stream unless liquid hydrocarbons are first extracted and removed. This is because it is absolutely necessary to remove all moisture content in the gas stream before proceeding to the very low temperatures necessary to extract helium. If these liquids are not removed, they will spray out, solidify and frost deposits will accumulate on heat exchange surfaces, making the helium extraction processes inoperative.

All three of the helex plants involved in this litigation extract and sell liquid hydrocarbons in the process of extracting helium, and revenues and profits from sales of these liquid hydrocarbons inure to the benefit of the helex companies or their affiliates. While it is necessary to remove these liquid hydrocarbons temporarily, they may be reintroduced into the gas stream after the helium is extracted. In helium extracting plants operated by the Bureau of Mines, the liquid hydrocarbons are not permanently removed and sold. They are, instead, returned to the natural gas stream after the helium constituent has been removed.

Crude helium is also extracted in a few private plants, and in plants operated by the Bureau of Mines. These plants, however, go one step further in the extracting

process, removing the nitrogen content of the crude helium mixture in order to produce an essentially pure helium product which is referred to as "Grade A helium," which is then distributed and sold to the ultimate consumer. "Grade A" helium has 99.995% to 99.997% helium content.[7] During earlier years, most consumer sales of Grade A helium were in gaseous form. In recent years, Grade A helium is more commonly sold in liquid form. Liquid helium is obtained by further cooling of Grade A helium to temperatures of -453°, 7 degrees above absolute zero, at which point it liquefies. Additional costs are incurred in the process of liquefying, storing, and transporting liquid helium.[8]

Immediately prior to the 1960 Helium Act Amendments, the Bureau of Mines was selling Grade A helium for "commercial markets" at $19.00 Mcf, and at $15.50 Mcf to governmental agencies. Since the conservation program, Grade A helium has been offered for sale by the government at $35.00 Mcf (the price designed to recover costs of the conservation program), while sales by private plants have ranged from the $35 government price down to $19.00 Mcf by the Kerr McGee plant in Arizona. [LPX 2-25; USX 70.] In 1967 there were some offers to sell Grade A helium for $15.00 per Mcf. [Garwin 3:288-290; Garwin Depo. USX 62, p. 13.]

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7. Helex X 323 illustrates how helium occurs and what it is called at various trade levels. See also Wheeler T 2d—15:1533, et seq.

8. During years 1961-1965 all Grade A helium was sold in gaseous form. In 1966, private plant operators began to sell in liquid form, and by 1974, approximately 80% of all helium sales were in liquid form. [Tr. 301, Tr. 1835, et seq.]

Witness Harlan testified costs of liquefying helium total $5.53 Mcf [Tr. 1840]; Witness Garwin set costs of liquification at $2.00 to $5.00 [Tr. 238-239.]

The sale price of Grade A helium in liquid form has ranged from $22 to $23 per Mcf of equivalent gas. [Tr. 1837].

Expert opinions are that due to scarcity of the commodity, the price of Grade A helium will rise to $75 to $100 per Mcf by 1985, with prices thereafter rising astronomically due to depletion of the resource. [Garwin 1:82.]

D. *Operations at Cities, Northern and National Helex Plants.*

1. *Northern Helex, Bushton, Kansas.*

The Bushton plant has three separate facilities: a liquid hydrocarbon extraction plant, completed in 1961; a helium extraction plant, completed in December, 1962; and an ethane extraction plant, which was completed in 1970. Both the liquids extraction plant and the ethane plant are operated by Northern Gas Products Company. The pipeline company, Northern Natural Gas Company owns Northern Gas Products Company. Northern Gas Products Company in turn owns Northern Helex Company.[9] [Wobker 13:1392.]

Two gas streams are processed in this plant: one, containing "rich gas", comes from 1,950 wells located over 38,000 square miles in Southwest Kansas and small parts of Oklahoma. The other, furnishing "lean gas" contains gas from areas other than the Hugoton area. [Wobker 12:1319.] Only the "rich" gas stream in this plant is

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9. Northern Gas Products Company operates the liquid hydocarbon plant at Bushton, per contract dated 10/28/60 with Northern Natural Gas. The liquids plant had already been built prior to execution of the helium conservation contract with the government, and liquid extraction was awaiting F.P.C. certification to "shrink" gas.

processed for helium, but both streams are processed for the extraction of liquid hydrocarbons.[10]

2. *Cities Service Helex Company, Jayhawk Plant, Ulysses, Kansas.*

All gas which is fed into this plant is processed for extraction of both liquid hydrocarbons and helium. Any gas which is bypassed around the plant does not get processed for either. [LPX 2-9.] The inlet gas composition at this plant did not vary in any material respect. During years 1964-1972, the helium content of the natural gas stream remained at .42% to .43%. [LPX 2-10; Cities X2.]

Some gas is bypassed around the plant and never processed for the extraction of helium. This is because the capacity of the Jawhawk plant is about 500 million cubic feet per day, and gas available from the pipeline may exceed 625 million cubic feet per day.

Approximately 75% of the gas feeding into the Cities plant has already been processed once for hydrocarbon content in conventional natural gasoline extraction plants. [Whiteaker 3:311.] Liquid hydrocarbons are recovered

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10. For general description of Northern operations, see Garwin 1:105; Whiteaker 3:310; Wobker 12:1314 et seq.

LPX 2-7, 2-8; NOX 22, 23, 26, 27, 28 are diagrams and flow sheets illustrating operations at Northern Helex. NOX 30, 31 illustrates projected and actual production figures at Bushton plant.

The Northern Natural Gas pipeline system is illustrated in maps appearing as NOX 21, 20 and plant investment, in NOX 16, 17. According to books and records of Northern Helex, the average rate of return during 1962-1973 was 6.7% after taxes [NOX 18]; and the net profit, after taxes, per Mcf of helium sold to the United States, ranged from approximately 68 cents per Mcf in 1963, to $2.61 Mcf in 1970 [See NOX 75; Sulentic 14:1446.]

in this plant, LPX 2-10, 211 reflecting yields of liquids from the Cities Helex plant.[11]

3. *National Helium Plant, Liberal, Kansas.*

Two different gas streams serve this plant: one, the "Kansas Gas Stream" has a .45% helium content. The other, the "Texas Gas Stream" has a helium content of .40%. Either of these two streams can be bypassed around the extraction plant, but once fed into the plant, they are combined, and treated as one. After the two streams are commingled, they are processed for extraction of both liquid hydrocarbons and helium. [LPX 2-12, 2-13.] In the National plant, after processing, the gas is reconstituted in order that it may leave the helex plant in two

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11. Cities X 13 is a map illustrating pipeline system of Cities Service Gas Company. Exhibit 14 lists book investment in system; Exhibit 15 lists all gas purchase contracts covering gas "which may have been processed" through Cities Helex Plant; Exhibit 20 is all major gas purchase contracts of Cities; Exhibit 16, schedule of Cities' gas exchange contracts; Exhibit 17 contains figures of net inputs into the Hugoton system, listing totals of exchange gas, gas delivered and sold, diverted gas.

For general description of operations at Cities Helex Plant, see Garwin 1:111, Harlan 17:1849 et seq., and see Cities Exhibits 1, 3, 4, 7 and 12 for volumes of gas processed at Cities; Exhibits 5, 6, 8, 10, flow diagrams, lists of equipment at the plant and testimony of Harlan 17:1791, et seq.

It should be noted that Cities Service Cryogenics, Inc., another subsidiary of Cities Service Gas Company, operates a separate helium extraction plant at Scott City, Kansas, as a joint venture with Kansas Nebraska Pipeline. This is referred to as the "Sunflower Plant" and this operation was not connected with the government conservation contracts. Cities Service Cryogenics operated a purifying and liquefying plant on the site of the Jayhawk Plant at Ulysses, but this was a separate operation from that conducted by Cities Service Helex. [See Harlan 17:1827, et seq.] According to books and records of Cities Helex, rate of return on average net investment, 7/1/63 to 12/31/71 was 12.916% [Cities X 11R], or on a cash flow basis, 8%. [Cities X 21.]

Again, according to Cities Helex books and records, return on average net investment, per Mcf of helium sold to the United States ranged from a loss of 37 cents per Mcf in 1963, to a high of $3.79 in 1967, and down to 3.51 per Mcf by 1971. [Cities X 29.] For discussion of rates of return in Cities Helex operations,[see Larson 17:1910 et seq.]

separate streams in essentially the same condition as at the inlet points.

Prior to construction of the National Helex plant, there was a hydrocarbon extraction plant at Liberal, operated by Century Refining Company, a subsidiary of Panhandle Eastern Pipe Line Company. This extraction plant processed essentially the same gas streams which presently serve the helium extraction plant. National has agreed to deliver for Century's account, certain amounts of liquid hydrocarbons comparable to those extracted previously by Century. See Garwin 1:116 et seq.: Garwin 1:184; Whiteaker 3:310. Approximately 27% of the gas which is processed in the National Plant comes from wells which are owned by Panhandle Eastern Pipe Line Company.[12]

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12. A general description of the National Helex facility appears in testimony of Garwin, 1:116, et seq., and LPX 2-12, 2-13.

Maps of the Panhandle Eastern Pipeline System, illustrating its three gathering systems, the Texas system, 140 miles, the Kansas system, 110 miles, and the Huber-Light system, through the Oklahoma Panhandle, 60 miles, appear as PEX 62, parts 1 and 2, and PEX 104, parts 1 and 2.

According to the books and records of National Helium Corporation, its average rate of return on it "average net investment," after taxes, on its helium operations alone was 15.35%. [PEX 96]

Its rate of return on total operations, including liquid hydrocarbon sales, for 1964, was 13.08%. [PEX 97]

According to National's books, the average cost of extracting helium, 1963-1971, was $6.94 per Mcf. [PEX 113]

Again, according to National's books, net revenues derived from sales of crude helium to the United States, before, and after income taxes, are the following: [PEX 114]

	Before Taxes	After Taxes
1963	$4.69 per Mcf	$2.21 per Mcf
1964	4.71	2.31
1965	5.32	2.70
1966	5.50	2.79
1967	5.41	2.75
1968	5.54	2.56
1969	5.74	2.65
1970	5.74	2.81
1971	6.13	3.07

By stipulation, all of the gas which has been processed in the three helex extracting plants just described is "jurisdictional gas." Jurisdictional natural gas is "gas which is being transported in interstate commerce for resale subject to rate schedules imposed by the Federal Power Commission." [Garwin 1:140-141.]

E. *Crude Helium Market.*

The United States conservation program created a market for crude helium which did not before exist. Between 1961 and March, 1971, the government purchased over 30 billion cubic feet of contained helium in a crude helium mixture for prices ranging from about $10 Mcf to $13 Mcf.[13] The contracts under which these purchases were made were negotiated in 1961, after notice of the program was given to about 370 parties. 292 F.Supp. at 655, 656.

Starting in 1966 several private plants began operations in the Hugoton area, making sales to parties other than the government.[14] Witness Harlan testified that the scope of

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13. The United States has paid three of the Helex companies for crude helium delivered to July, 1972. Northern has been paid for deliveries through March 28, 1971. Other litigation is pending concerning the government's termination of the Helex conservation program.

14. USX 1 shows location of Bureau of Mines and Conservation plants, 1973, with dates of initial production; USX 2 shows location of private industry helium plants, and dates of initial production. These private plants are:

Sunflower Plant—owned by Cities Service Cryogenics;

Otis Plant—owned by Kansas Refined Helium Company;

Greenwood Plant—owned by Alamo Chemical Co. and Gardner Cryogenics;

Pinta Dome Plant—operated by Kerr-McGee Oil Industries;
"Navajo Plant"—operated by Western Helium Corporation

(Continued on following page)

these sales approximated 20% of the crude helium extracted since 1966 by private, non-conservation plants, and that the sales price had been in the range of $12 to $14 Mcf of contained helium. [Tr. 17:1827-1834.]

About 1/2 of the contained helium which moved to the fuel markets as part of the gas stream from the Hugoton gas area in the 1960's was not processed through any helium extraction plant. [USX 16.]

By 1966, the helex conservation plants were producing more crude helium than they could sell to the Bureau of Mines. The United States agreed to store this excess production in the Cliffside storage reservoir, and stored and returned the following amounts of contained helium during the years indicated: [USX 11, 12].

National Helium Corporation	Cities Service Helex	Phillips Petroleum Company	Northern Helex Company
1966-1973 Mcf	1967-1973 Mcf	1968-1973 Mcf	1971-1972 Mcf
In: 302,519	In: 205,061	In: 78,440	In: 877,150
Out: 251,355	Out: 128,039	Out: 21,389	Out: 44,788

Northern has disposed of some surplus crude helium by sale to Kansas Refined Helium at a price of $9.50 Mcf of contained helium in the crude helium mixture. [USX 28, 29; Tr. 2:226-227.] National Helium has sold some surplus to Kansas Refined Helium at a price of 34 cents more than prices paid by the United States. [Tr. 19:2156-

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Footnote continued—

USX 3 shows location and dates of both government and private helium extracting plants which have closed down during years 1968-1973.

USX 4 summarizes helium conservation contracts.

USX 5 lists all helium extracting plants which have operated in the United States from 1929 to date, with data concerning plant capacity and helium content of gas processed in each plant.

The three helium plants involved in this action have the largest capacity, but process gas with least helium content, approximately 4/10ths of one percent (1%).

2159.] National has also sold about 50 million cubic feet of helium in crude helium to Airco Company at a price of $12.45 Mcf, approximately the price being paid by the United States. [Tr. 19:2158, 2159.]

National Helium still has 51 million cubic feet of contained helium in storage at Cliffside and has been unable to dispose of this or of the helium it has extracted since the United States terminated the helium purchase contract it had with National Helium. [Wilson 19:2155-2160.]

Northern has tried to sell the helium which it has extracted since the government stopped buying from its Bushton plant, but it has been unsuccessful, [Tr. 2:219-226; 12:1273, NOX 34.] and Northern has been venting helium to the air.

At the end of 1973, the United States had 36,529,439 Mcf of conserved helium in underground storage at Cliffside. [USX 10.] None of the crude helium delivered to the United States in connection with the conservation sales contracts has been removed from storage at the Cliffside reservoir. [USX 14, 15, Tr. 2:189, 20:2335, 2336.] None of the conservation helium has been sold to anyone. If and when it is removed from storage at Cliffside, it would have to be purified to get it in a stage comparable to the crude helium state in which it was initially delivered by the Helex plants. This is because it has become mixed with other natural gas native to Cliffside Field. [Tr. 19:2195-97.] If the United States wanted to sell this stored helium today which it has no plans to do, the chance of selling it at a reasonable price in today's market would not be very good. [Tr. 20:2337-2339.]

One practical example of the dilemma faced by the United States in implementing its helium conservation program is illustrated by the fact that if the government

buys crude helium for $12.00 per Mcf, and must borrow the money to do so, and then is required to store it for 30 years before it is needed for the consumer market, it would have to sell one Mcf of helium for $300 simply to recover the interest compounded on its initial $12 "investment." See USX 63, charts on committee hearings, 1969. [USX 14, and Dunn 8:873-876.]

USX 13, 14 and 15 graphically illustrate the fact that helium recovery capacity vastly exceeds the demand and consumer market, and that with cancellation of the conservation contracts by the United States, the principal buyer for crude helium has vanished, and the market value of crude helium today, for all practical purposes, is "zero."

F. *Termination of Conservation Contracts.*

In January, 1971, the United States decided to terminate its contracts with the Helex companies, effective March, 1971, due to diminution of demand for helium for government activities, discoveries of new helium reserves, and availability of helium from natural gases of low helium content. [PEX 71; USX 71, 72, 17 and 18.]

The Federal Helium Conservation Program did not produce the income anticipated by its planners for two principal reasons: government sales of helium at the $35 price were substantially less than expected; and a greater volume of helium was extracted by conservation extractors and by private extractors than had been anticipated. It was found that if conservation contracts were continued, about 69 billion cubic feet of helium would be stockpiled, instead of 43 billion cubic feet anticipated, and that rather than being self-liquidating, as required by the Helium Act, the program would owe the Treasury about $1.5 billion

for borrowings and interest. [Lipper Tr. 20:2301-07; USX 63, USX 67-69.]

In connection with the alleged failure of the United States to pay for helium deliveries, Northern in 1970 declared its contract breached, but during the following 18 months, it continued to produce crude helium which it stored at Cliffside, under a storage agreement with the Bureau of Mines. [Wobker 13:1363.]

Since September 28, 1972, Northern has been venting the crude helium gas mixture into the air. There is no market for the stored helium, and it is not economically feasible for a business to produce helium for storage. [Wobker 13:1364-65; Nicholson 12:1272-73.]

The termination of contracts with National, Cities and Phillips pursuant to the January 26, 1971 termination notices, to be effective March 28, 1971 [PEX 71] was enjoined by federal court on grounds the Secretary of Interior had not complied with National Environmental Policy Act. National Heluim v. Morton (10th Cir.), 455 F.2d 650, D.C., 326 F.Supp. 151.

By letters dated February 2, 1973, the Secretary of Interior issued new notices of termination of the contracts to National Helium, Cities Service Helex, and Phillips Petroleum Company, effective April 4, 1973. [PEX 72.] This termination was approved by the Court of Appeals. National Helium Corporation v. Morton (10th Cir., 1973), 486 F.2d 995, cert. den. 416 U.S. 993, 94 S.Ct. 2405, 401 L.Ed.2d 772. The valve through which crude helium was delivered by National Helium Corporation to the Bureau of Mines was turned off on November 12, 1973. [Wilson Tr. 19:2154-55.]

On December 24, 1970, Northern Helex filed suit against the United States seeking damages for breach of

the conservation contract. On January 21, 1972, the Court of Claims granted Northern Helex summary judgment, holding that the United States had materially breached the contract, by failing to pay for crude helium delivered by Northern and leaving for further determination the amount of recovery. [NOX 36A, 36B, 36C.] Northern Helex Company v. United States (1972), 455 F.2d 546, 197 Ct.Cl. 118.

The Court of Claims found that from November 1969 through November, 1970, the government paid nothing at all for helium delivered by Northern. On January 14, 1971, after suit in the Court of Claims was filed, the United States sent Northern Helex a check for $8,671,631.99, the total amount then due for all helium delivered by Northern. On January 26, 1971, the contract was terminated, effective March 28, 1971.

Northern refuses to recognize the legitimacy of termination and has billed the United States for helium delivered through March 31, 1971. On June 23, 1971, Northern received a check for $2,285,872.87 for deliveries December 1970 through March 28, 1971.

Northern takes the position that these two payments are in mitigation of damages and not payments for deliveries of crude helium.

For some period of time, the United States accepted deliveries of crude helium from Northern Helex, under interim agreements for storage at Cliffside, but when negotiations for a long term storage agreement broke off, the government ceased accepting deliveries on September 28, 1972, and Northern commenced venting helium into the atmosphere. [NOX 36D, 36E, 36F; Wobker, 13:1363-1365; Nicholson 12:1272.]

The Court finds that Northern made deliveries of crude helium through the first 27 days of March, 1971, and that deliveries thereafter were stored for Northern's account.

The Court further finds that, for the purpose of Case No. KC-1969, the two payments made by the United States of $8,671,631.99 on January 14, 1971, and of $2,285,872.87 on June 23, 1971 constituted payment for deliveries of crude helium by Northern through March 28, 1971, and that such sums constitute a portion of the Fund which is the subject matter of Case No. KC-1969.

G. *The Gas Purchase Contracts.*

Considerable attention was given to the gas purchase contracts existing between the pipeline companies and the lessee-producers in this Court's prior opinion, 292 F.Supp. at 669 et seq. The contracts in question number approximately 320 in the case of Northern Natural Gas Company, 532, in the case of Panhandle Eastern Pipe Line Company, and approximately 100 in the case of Cities Service Gas Company.

These contracts provide that the lessee-producers warrant title to all gas "sold," "delivered," or "sold and delivered," and they indemnify the pipeline purchaser against losses arising out of adverse claims with respect to the gas conveyed. The contracts further provide that in the event of adverse claim to the gas, the pipeline purchaser may retain the purchase price, up to the amount of such adverse claim, without interest, until such adverse claim has been determined.

Under most of the contracts the producer sells the gas to the pipeline at the wellhead. As the gas is produced, it passes through wellhead meters and is delivered to the pipeline.

In some instances, the producer sells the gas to the pipeline off the leased premises, after gathering to a central point, or after processing through a gasoline plant. In these cases, the volume of gas delivered to the pipeline is measured at such central point, or at the "tail gate" of the gasoline plant.

Each of the gas purchase and sales contracts states a unit price per Mcf in money, and lessee-producers are paid on the basis of volume of the entire metered stream of gas at the delivery point, without regard to the individual components of such gas.

The contracts commonly include provisions for periodic step escalations in the price to be paid, frequently stated in terms of cents per Mcf of gas delivered during five year intervals. Some contracts provide for re-negotiation, at stated periods, and if the parties fail to agree on a new price, provisions are made for arbitration.

The producers' sales of gas to the pipelines are sales in interstate commerce of natural gas for resale. The contracts under which such sales are made are filed with the Federal Power Commission under the Natural Gas Act, as amended, 15 U.S.C. § 717 et seq. The pipelines' payments for gas under such contracts are made at rates established or permitted to be paid by the Commission, expressed in cents per Mcf applied to the delivered volumes of gas.

The price paid by the pipeline companies for purchased gas was the FPC ceiling price, or the price recited in the gas purchase contract, whichever was lower, and the price paid was applied to the volume of the entire gas stream.

During the period here in question, the prices paid by each of the three pipeline companies involved in these interpleader actions, exclusive of prices paid for new sup-

plies after 1970, ranged from a low of approximately 11.5 cents per Mcf to a high of approximately 18.5 cents.

From 1962 to 1972, Northern Natural Gas Company bought gas at the following average prices: [NOX 39.]

	Kansas	Oklahoma
1962	13.14¢ per Mcf	16.85¢ per Mcf
1963	13.02¢	15.97¢
1964	11.45¢	15.81¢
1965	11.65¢	16.20¢
1966	11.69¢	16.74¢
1967	12.16¢	17.35¢
1968	12.85¢	17.24¢
1969	13.11¢	17.19¢
1970	13.17¢	17.61¢
1971	14.75¢	17.75¢
1972	15.20¢	18.56¢

From 1962 to 1972, Northern's predominant unit costs for new contracts for gas purchases were the following: [NOX 40.]

	Kansas	Oklahoma
1962	16.0¢ per Mcf	17.0¢ per Mcf
1963	16.0¢	17.0¢
1964	16.0¢	17.0¢
1965	16.0¢	17.0¢
1966	16.0¢	17.0¢
1967	16.0¢	17.0¢
1968	16.0¢	17.0¢
1969	16.0¢	17.0¢
1970	19.0¢	17.0¢-20.0¢-23.5¢
1971	19.0¢—24.0¢	20.0¢—23.5¢
1972	26.5¢—36.0¢	20.0¢-32.0¢—44.0¢

The Northern gas purchase contracts are in evidence as NOX 1-15, and summaries of contracts covering 85% of gas purchased by Northern appear as NOX 41-58 and 61-74. Some of Northern's contracts, as to certain time periods, provide for a price in excess of the ceiling area rate established by the FPC (e. g., NOX 41); some provide for a price equal to such ceiling area rate (e. g., NOX 42); and some provide for a price lower than the area rate (e. g., NOX 63). [Kratky 14:1514-1515.]

From 1961 to 1971, Cities Service Gas Company bought gas at the following average prices for wellhead delivery: [Morton 15:1576-1577; Hofsess 17; 1763-1764; Cities X 25.]

	Kansas	Oklahoma	Average
1961	12.16¢ per Mcf	11.50¢ per Mcf	11.68¢ per Mcf
1962	11.57¢	12.14¢	11.69¢
1963	13.99¢	12.35¢	13.58¢
1964	14.07¢	12.19¢	13.58¢
1965	14.12¢	12.11¢	13.64¢
1966	12.91¢	12.49¢	12.81¢
1967	12.93¢	12.90¢	12.92¢
1968	12.92¢	13.39¢	13.04¢
1969	12.79¢	13.24¢	12.89¢
1970	12.81¢	14.22¢	13.11¢
1971	12.86¢	16.26¢	13.61¢

Comparable figures for Cities Service field line purchases, 1961-1971 in Kansas and Oklahoma, appear in Cities X 26. Cities Service Gas Company gas purchase contracts appear in evidence as Cities X 20, Parts 1-10. A schedule of contracts where the full contract price was paid is Cities X 19; and a schedule listing contracts where less than contract price was paid appears as Cities X 18.

From 1962 to 1972, Panhandle Eastern Pipe Line Company bought gas at the following average prices: [Morton 15:1575.]

1962	13.8¢ per Mcf
1963	14.3¢
1964	14.3¢
1965	14.6¢
1966	15.1¢
1967	15.6¢
1968	15.6¢
1969	15.9¢
1970	17.2¢
1971	17.0¢
1972	18.6¢

The average prices for gas specified in *new* contracts made by Panhandle during 1962-1972 were as follows: [Morton 15:1576.]

1962	16.08¢ per Mcf
1963	16.45¢
1964	15.97¢
1965	16.64¢
1966	16.67¢
1967	16.04¢
1968	17.05¢
1969	17.01¢
1970	19.83¢
1971	22.36¢
1972	31.10¢

A list of Panhandle gas supply contracts appears as PEX 1. The actual contracts, appearing as PEX 2, and numbering over 500, were withdrawn by leave of court. [Tr. 18:1975.]

Computer printouts PEX 3, give data on all gas delivered to Panhandle; PEX 4, gives data on gas purchases where full contract price was not paid; and PEX 5 are computer runs on gas purchase contracts where full contract price was paid.

Approximately one-third, or 27% of the gas stream supplying the National Helex plant via Panhandle Eastern Pipeline came from approximately 580 gas wells owned by Panhandle Eastern, and gas so produced was not subject to any gas purchase contract. For purposes of computing royalties payable to landowners, Panhandle set a value on this gas in the Kansas and Oklahoma Hugoton fields at 11¢ per Mcf from August 1, 1963 to November 1, 1971. These values were raised to 12.50 cents per Mcf in the Kansas Hugoton field, and to 13.25 cents per Mcf in the Oklahoma Hugoton field on November 1, 1971, after suit had been filed on behalf of various landowners.

On its own production in the West Panhandle of Texas, Panhandle Eastern paid royalties based on values of 12 cents per Mcf from 8/1/63 to 1/1/65; 13 cents from 1/1/65 to 11/1/71; and 13.50 cents from November 1, 1971 to January 1, 1972. [PEX 6; Dixon 19:2075, 2090; Wiedenheft 18:1988-2000.]

Another large portion of gas carried by the Panhandle pipeline system was acquired by Panhandle from producers and other pipeline companies under 22 gas *exchange* contracts involving the exchange of gas for gas [PEX 2, Contracts numbered 9001 through 9022; Dobbs 18:2028, 2035-2036, 2045-2047.] No money changed hands on these gas exchange contracts. No price per Mcf was attached to or placed on gas exchange between the parties, and these agreements appear to have been made for the convenience and mutual benefit of the parties. A typical

exchange contract provides that: [PEX 2, Contract No. 9004, pp. 4, 5; 9008, ¶ 8.]

> . . . possession of and title to all gas exchanged * * * shall pass to the receiving party at the point of delivery.

and arrangement under the contract

> . . . shall be limited to the exchange of gas and shall not be considered or held to be a sale, and no price shall be placed on the gas received.

With respect to gas balancing, the exchange contracts typically stated that it was understood that the exchange of gas was for the mutual benefit of the parties and was made with no thought whatever of the profit or loss that would ordinarily attend a sale or purchase of gas and no price per Mcf was attached to any of the gas exchanged between parties. [Dobbs 18:2034-2036; PEX 2, Contract 9008, ¶ 8; PEX 2, Contracts 9001-9022.]

Many of the points of exchange are long distances from each other and many are for transportation convenience of the parties. Part of the exchanges cover gas from a particular well, or wells, and part is from pipelines. Sometimes wellhead gas is exchanged for pipeline gas. Dobbs 18:2029, 2045; PEX 34 summarizes gas exchange contracts, and PEX 35-56 consist of maps indicating points of delivery and re-delivery of gas under each specific exchange contract.

None of the 22 gas exchange contracts implemented by Panhandle contains any provision for adjustment of volumes in exchange by reason of the helium constituent, either in the gas delivered, or in the gas received. [Dobbs 18:2040, 2045-2047.]

H. *Processing Agreements Between Helex Companies, and Pipe Line Companies.*

The gas supply for the Northern Helex Plant at Bushton is obtained by contract with Northern Natural Gas Company; the gas supply for Cities Helex is obtained from Cities Service Gas Company; and the supply for the National Helium Plant at Liberal, is obtained by contract with Panhandle Eastern Pipe Line Company.

After the gas was delivered by Lessee-Producers to the pipelines at prices ranging from approximately 11.5 cents to 18.5 cents per Mcf, as discussed supra, it was then conveyed by the pipeline companies to the helium extraction plants for processing before continuing on to ultimate fuel consumers.[15] On its way to the Helex plants, some of the gas was sold "off the line" to consumers or other pipeline companies; some was consumed as fuel in the pipeline compressor stations, etc., and some of the gas was completely bypassed around the extracting plants.

The gas which was delivered to the Helex plants was subject to certain "processing agreements," whereby the Helex companies made various payments to the pipeline companies for the right to extract helium and hydrocarbons.

The National Helium-Panhandle Eastern Agreement, dated October 2, 1961 [LPX 2-79], covering a gas stream with .40% helium content, granted the right to extract helium, helium-gas mixtures, nitrogen, and certain liquid

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15. The Bushton helex plant is approximately 100 to 150 miles distant from the Hugoton area where Northern Natural Gas Company purchased gas. [Arnold 21:2506; Hanley 14:1483-92; NOX 19, 29]

Portions of Panhandle Eastern gas are transported more than 100 miles before reaching the National Helex plant at Liberal.

hydrocarbons, other than methane.[16] For this privilege, National paid Panhandle Eastern a base price of 35¢ per Mcf for "shrinkage,"[17] plus a base price of $2.06 per Mcf for all volumes of contained helium extracted by National. The $2.06 base figure for helium was subject to escalation according to the wholesale price index, and this fee ranged from $2.05 in 1963 to $2.36 in 1971, and averaged $2.16.[18] [PEX 113, Schedule 1; Lawson 21:2429.]

The Cities Helex—Cities Service Gas Company Agreement, dated August 18, 1961, contemplates delivery of a gas stream of .47% helium. [LPX 2-64, 2-65] The Cities Service arrangements provide for a processing fee of 1.35 cents for each Mcf of natural gas delivered to the Helex plant, subject to adjustment for helium content of the gas stream above and below .47% helium content. [LPX 2-65, "Processing contract," ¶ 5(a)] The figure of 1.35 cents per Mcf, as applied to the whole gas stream, is equivalent to $3.00 per Mcf for contained helium which is extracted from that stream. [Garwin 3:298]

The Northern Helex—Northern Natural Gas Agreement, dated July 28, 1961 [LPX 2-61], contemplates delivery of gas containing .46% helium, and provided for payment of 28 cents per Mcf for volumes of helium gas

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16. National was required to reinject hydrocarbons as necessary to maintain gas re-delivered to Panhandle at fuel content of 975 BTU.

17. Shrinkage included fuel consumed within the plant, and loss attributable to helium extraction. Shrinkage at the National plant was attributable 75% to hydrocarbon extraction; 20% to helium extraction; and 5% to nitrogen extraction. [Whiteaker 4:403-404]

18. On October 31, 1963, Panhandle agreed to reimburse National for payments made under the provisions for $2.06 per Mcf for helium extraction in the event this Court determines a part of this sum is due and owing to third parties. [LPX 2-91; Whiteaker 4:424; 4:438]

extracted.[19] Northern Helex also agreed to pay to Northern Natural Gas, all payments which the pipeline company might be required to pay to third parties for their interest in the helium extracted.

The extraction of liquid hydrocarbons, which was a separate operation run by an affiliated company, Northern Gas Products Company, was the subject of separate contracts. A 20-year liquid hydrocarbon extraction agreement between Northern Natural Gas and Northern Gas Products [NOX 24, as amended NOX 24B, 24A] provided a right to extract liquid hydrocarbons for payment by Northern Gas Products of 46 cents per Mcf for "shrinkage," with Northern Products obliged to redeliver gas equivalent in heating value to 975 BTU. By amendment of June 26, 1967 [NOX 24B] the right to extract ethane was added, for a payment of 26 cents per Mcf for volumes of gas used in extraction of ethane alone. Actual payments for these liquid extractions were made under a formula provided by contract. [NOX 24A][20]

I. *Contentions of the Parties—"Reasonable Value".*

The Court permitted the parties to explore the question of "reasonable value" in terms of its widest scope and ramifications. As a result of this, the Court has before it evidence that the "reasonable value" of commingled helium in the natural gas stream ranges from a "negative value" of several dollars [PEX 118]; that its value is "zero"; that its value is the agreed volumetric prices set

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19. The written contract provides for payment of 28 cents per Mcf. [LPX 2-61, Article V, § 5.1] One witness testified the payment was 23 cents per Mcf. [Nicholson 12:1301]

20. Northern Natural Gas Company was required to add approximately $4,310,100 in additional pipelines and compressor equipment in order to provide additional gas for ethane extraction. [NOX 25]

out in gas purchase contracts, as regulated or not regulated by the FPC, in any event, not more than 15 to 20 cents per Mcf of helium; and that its "reasonable value," according to evidence offered by lessee-producers and landowners, ranges from $2.74 to $15.79 per Mcf of helium extracted at the Cities Helex plant; from $7.77 to $12.64 per Mcf for helium extracted at the Northern Helex plant; and from $12.74 to $16.20 per Mcf for extracted helium at the National Helium plant.

This rather surprising gulf between the parties' notions of "reasonable value" stems of course from further exhaustive evidence organized and offered by all opposing sides, in support of their respective versions of "the refreshing authority found in the folk-tale of the Little Red Hen," thoughtfully noted by the Court of Appeals, 441 F.2d 704, at 721.

In the search for "reasonable value" this Court has received evidence touching upon the value of helium in its various states, as it appears in "helium bearing natural gas," "contained helium," "crude helium" and "Grade A helium." Helex Ex. 316, 328 graphically illustrates the fact that it is most necessary to carefully consider the "market place" in which one references "value." These "market places" include:

1. The sale of helium bearing natural gas by the lessee-producers to the pipeline companies: As noted, these sales ranged from approximately 11.5 cents to 18.5 cents per Mcf. The Court of Appeals has ruled that these payments did not include payment for the helium constituent.

2. The sale of helium bearing natural gas by the pipeline companies to ultimate fuel consumers. In such

instance, the contained helium has no value because it is vented into the atmosphere.

3. The "sale" of contained helium by the pipeline companies to helium extracting plants through "processing agreements," wherein payment is made for "shrinkage," and/or a fee is charged based upon volumes of contained helium extracted, such fees generally ranging from $2.00 to $3.00;

4. The "sale" of liquid hydrocarbons which may be extracted as a "by product" or "joint product" of the helium extracting processes;

5. The sale of crude helium to the United States Government by the Helex companies, under the conservation contracts at the approximate price of $12.00 per Mcf for contained helium;

6. The sale of crude helium to private helium plants producing Grade A helium, at prices of approximately $12.00 to $9.50 per Mcf for contained helium;

7. The sale of Grade A helium by Bureau of Mines plants at a price of $35.00 per Mcf;

8. The sale of Grade A helium by private plants at prices ranging from $19.00 to $35.00 per Mcf; and

9. Future sales of helium stored in the Cliffside Field in the year 2,000 with evidence of value at that point ranging from $75 to $100 per Mcf up to unknown values.

With these "markets" in mind, and in arriving at its ultimate conclusion as to value, the Court has considered evidence provided in the gas purchase and gas exchange contracts between the pipeline companies involved in these interpleader actions and their suppliers; gas purchase contracts between other parties which involved sales of "helium bearing natural gas;" gas purchase contracts by intra-

state purchasers which were not subject to FPC rate regulation; various arrangements made by the United States for gas supplies in the operation of government helium extraction plants; the processing agreements made between the Helex companies and their pipeline suppliers; and arrangements and payments made by "private" helium extracting companies which were not involved in the conservation program. In addition to such contractual evidence, the Court has also fully considered evidence produced by all parties concerning "costs" of extracting helium, appropriate rates of return to both the Helex companies and lessee-producers, as well as the opinions of numerous experts who testified as to their opinion of the reasonable value of contained helium at the wellhead. Before discussing such evidence in greater detail, the Court will attempt to summarize the contentions of the parties concerning "value."

Lessee-Producers and Landowners

Briefly stated, the sole theory of value offered by Lessee-Producers and their co-parties in interest, the Landowners, was based upon the premise that there were no comparable sales of commingled helium at the wellhead by which value could be ascertained, and that therefore, the proper method to arrive at value was to use a "proceeds less expense" approach to the question, so as to "work down" to a proper figure. In applying this theory, the Lessee-Producers urge that the first free, open, competitive market for helium is that of sales of Grade A helium, the state in which helium is bought by and sold to, the ultimate consumer. Thus, the Lessee-Producers start their "work down" approach, not with the *actual* proceeds received by the Helex companies from sales of conservation helium to the Bureau of Mines,

which was approximately $12.00 per Mcf for contained helium in the crude helium mixture,[21] but rather with a figure of $20.00 per Mcf which they represent to be a conservative, average estimate of the "market value" of Grade A helium sold to ultimate consumers during the years 1963-1971.

From this figure of $20, the Lessee-Producers would deduct the "cost of purification" of crude helium into Grade A helium, estimated to be $2.00 per Mcf,[22] and then subtract "costs of extraction" to arrive at a final value for the helium content of the gas stream processed in each individual helex plant for each of the several years.

The "costs of extraction," [LPX 2-19] were computed by taking operating expenses from company records (with certain adjustments believed to be required by Lessee-Producers' experts), adding on a figure which the producers considered to be a "fair rate of return" on the helex companies' investments,"[23] and then deducting from

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21. Proceeds actually received from sales to the Bureau of Mines, 1962-1971 were found in LPX 2-20:

Sales of Helium-Gas Mixture to U.S., per Mcf

Helex Co.	1962	1963	1964	1965	1966	1967	1968	1969	1970
Northern	$11.188	11.184	11.187	11.216	11.296	11.485	11.677	11.871	12.184
Cities		11.833	11.853	11.880	11.948	12.080	12.302	12.536	12.849
National		11.775	11.798	11.851	12.002	12.231	12.445	12.70	13.076

The figures for 1971 were: Northern $12.410; Cities Service, $13.090, and National $13.516.

22. See LPX 2-15; Garwin 1:170. Cost of purification. i.e., further cooling and processing of crude helium (approximately 70% helium, 30% nitrogen) into Grade A helium, i. e., 99.99% pure helium. The $2.00 cost figure was disputed by Helex witnesses.

23. See LPX 2-23A, and Dunn 5, 6:530-590. Witness Dunn's "hurdle rate of return" for Cities was 6.50%, for Northern, 6.89%, and for National, 7.60%. Actual realized rates to be gained from these "hurdle rates" were more, as exemplified in Schedules 13, 20 and 36, LPX 2-23A. For 1971 rates of returns on gross investment would be 9.36%, 11.02% and 12.84% respectively. [Dunn 6:588]

these expenses a figure determined to be a "by-product liquids credit," which was arrived at by computations concerning profits realized by the Helex companies from their liquid hydrocarbon extraction operations, which were carried on in conjunction with helium extracting activities.

The results of these various, elaborate computations produced widely varying "values" within each Helex plant, and from year to year, such variations of course, resulting from comparative efficiencies and costs within each plant, and, depending in part, upon profits made from extraction of liquid hydrocarbons. Ultimate values, according to Lessee-Producers are set out in LPX 2-24, as explained by Dunn: 6:592 et seq.:

COMMINGLED HELIUM EXTRACTED BY CITIES SERVICE HELEX, INC.

1963–1971

	1963	1964	1965	1966	1967	1968	1969	1970	1971
Minimum market Value of Grade A Refined Helium	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00
Cost of Purification of Helium Gas Mixture (crude helium)	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00
Cost of Extraction by Helex Company	$15.26	$ 6.61	$ 4.96	$ 3.74	$ 2.21	$ 4.17	$ 5.38	$ 3.85	$ 4.15
Value of Commingled helium at Lessee-Producer delivery point	$ 2.74	$11.39	$13.04	$14.26	$15.79	$13.83	$12.62	$14.15	$13.85

COMMINGLED HELIUM EXTRACTED BY NORTHERN HELEX COMPANY

1963–1971

	1963	1964	1965	1966	1967	1968	1969	1970	1971
Minimum Market Value of Grade A Refined Helium	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00
Cost of Purification of Helium Gas Mixture (crude helium)	$ 2.00	$ 2.00	$ 2.00	$2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00
Cost of Extraction by Helex Company	$10.23	$ 5.49	$ 5.79	$ 5.89	$ 5.36	$ 5.68	$ 5.39	$ 5.40	$5.39
Value of Commingled Helium at Lessee-Producer delivery point	$ 7.77	$12.51	$12.21	$12.11	$12.64	$12.32	$12.61	$12.60	$12.61

COMMINGLED HELIUM EXTRACTED BY NATIONAL HELIUM CORPORATION

1963–1971

	1963	1964	1965	1966	1967	1968	1969	1970	1971
Minimum Market Value of Grade A Refined Helium	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00	$20.00
Cost of Purification of Helium Gas Mixture (crude helium)	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00	$ 2.00
Cost of Extraction by Helex Company	$ 5.26	$ 5.26	$ 3.90	$ 2.51	$ 1.80	$ 3.17	$ 3.63	$ 3.74	$ 3.60
Value of Commingled Helium at Lessee-Producer delivery point	$12.74	$12.74	$14.10	$15.49	$16.20	$14.83	$14.37	$14.26	$14.40

When the above values are converted into cents, per Mcf for the whole stream of natural gas delivered from the wellhead, the result is approximately 3.5 cents per Mcf for natural gas delivered into the Northern plant, 4.0 cents per Mcf for natural gas delivered into the Cities Service Helex plant, and 4.5 cents per Mcf for natural gas volumes delivered into the National Helium plant. [LPX 2-100][24]

The Lessee-Producers' approach to valuation of the helium content of helium bearing natural gas was successfully urged by the producer in Ashland Oil, Inc. v. Phillips Petroleum Co. (N.D. Okl. 1973), 364 F.Supp. 6, appeal pending, a suit which involved the Phillips' Helex plants in Texas. In that instance, where the Phillips' plant

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24. The cents per Mcf for total volumes of the entire gas stream delivered into the extracting plants was arrived at by a formula of dividing total helium per Mcf delivered to the government, by the gross Mcf of gas delivered from the wellhead, times the reasonable value of helium, as calculated by the Lessee-Producers in LPX 24.

The figures appearing in LPX 2-100, were provided at the request of the Court [Tr. 8:889-892] and appear as *cents* per Mcf:

	1963	1964	1965	1966	1967	1968	1969	1970	1971
Cities Service	0.24¢	2.86¢	4.06¢	4.81¢	5.38¢	5.05¢	3.65¢	3.80¢	3.84¢
National Helium	4.08¢	4.32¢	5.03¢	5.10¢	5.05¢	4.37¢	4.62¢	4.42¢	4.55¢
Northern Helex	0.77¢	2.81¢	3.25¢	2.93¢	3.48¢	3.74¢	3.88¢	3.36¢	0.79¢

At the request of the Court, certain other exhibits were offered by the Helex companies concerning "proceeds less expense" computations:

NOX 60 uses Dunn's "rate of return" 6.89%, and shows a resulting loss of $13 million on the Northern conservation contract. [Tr. 12:1276-1279]

PEX 118, using actual proceeds received, indicates values for National plant, after taxes, with 14% return on investment. [Lawson 22:2401] These values range from a *loss* of $2.03 per Mcf in 1963, to a value of $2.51 in 1971, and an average value of 94¢ per Mcf.

LPX 2-112, offered in rebuttal, sets out values, less expenses, as recorded in company books and records.

was selling crude helium to the Bureau of Mines at a base price of $10.30 per Mcf, the Court found minimum values of contained helium to be within a range of $14.19 per Mcf to $16.45 per Mcf for gas processed at the Phillips' Sherman plant, and within the range of $12.07 per Mcf and $13.19 per Mcf for gas processed at the Dumas, Texas plant.

Helex Companies

The Helex companies have not abandoned their contention, rejected by the Court of Appeals, that the FPC has jurisdiction over the commingled helium delivered at the wellhead, pursuant to the gas sales contracts. Since the Court of Appeals has ruled definitively on that issue, no further discussion need be had concerning the merits of this position.

The Helex companies further contend that the helium contained in the natural gas stream, at the times and places of sale by the Lessee-Producers to the pipelines, had no economic value except as a part of the total volume of gas sold, and accordingly, the "reasonable value" of such helium is the unit price expressly agreed upon by the parties in the gas sales contracts, whether that price be 6¢, 10¢, 12¢ or 16¢ and that such agreed price should, in each instance, be applied against the volumes of helium contained in the gas sold by the Lessee-Producers which was subsequently processed for helium extraction and sold to the United States.[25] [See Tr. 19:2094]

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25. The pipeline companies, Cities Service Gas Company and Northern Natural Gas Company, by way of counterclaim, seek credit for sums they have already paid at prices authorized by the Federal Power Commission for all volumes of the total gas stream which are attributable solely to the helium component. [See proposed findings, ¶ 47, Northern Helex, Dkt. No. 1704 and proposed findings, Cities Helex ¶¶ 178, 179, Dkt. No. 1705]

In the absence of "an agreed reasonable value" by the parties to the gas purchase contracts, the Helex companies contend that considering evidence of comparable sales of helium bearing natural gas in the Hugoton area, and considering supplies available, the value of helium during the period of 1961 to 1971 ranged from 15¢ to 20¢ per Mcf, and in no event exceeded the sum of 25¢ per Mcf, which represents the Lessee-Producers' average costs of producing helium bearing natural gas. These figures were supported by expert opinions by Max Arnold, a professional appraiser, who analyzed numerous interstate and intrastate gas sales contracts, in relation to supplies and demand for helium bearing natural gas; [Helex X 316, 328, Tr. 21:2522][26] Sherman Clark, [Tr. 10:1096, 11:1120; 1143-1144, Helex X 309] an expert in economics, who analyzed value in relation to supply and demand, and concluded that the value ranged from 15 to 20 cents per Mcf for contained helium; and Dr. Walter Morton, an expert in the fields of rate return and economics. [Tr. 15:1566-1577] Dr. Morton analyzed value in terms of cost to the Lessee-Producers in producing the contained helium. In other words, a type of "work-up" method by which he concluded that the producers should be entitled to their cost of production for each Mcf of contained helium plus a "fair rate of return" of about 16% on *their* investment. Using this approach, Dr. Morton concluded that the reasonable value

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26. Arnold's testimony is summarized in Helex Ex. 328, 316. This opinion was based upon consideration of interstate and intrastate gas sales contracts; a cost approach, and an "income approach", which he rejected as inapplicable to sales of commingled helium at the wellhead.

Arnold's evaluations for each year were as follows:

1961—15 cents per Mcf	1967—16.5 cents per Mcf
1962—15.5	1968—17
1963—15.5	1969—18
1964—16	1970—19
1965—16	1971—20
1966—16.5	

of contained helium at the wellhead for years 1961-1972 ranged from 25 cents to 45 cents per Mcf for contained helium.[27]

J. *Indicators of Value.*

The Helex Companies and the United States urge that ample market data exists concerning "comparable sales," from which a determination of reasonable value can be made without resort to the proceeds-less-expense theory relied upon by Lessee-Producers. Evidence concerning such comparable transactions may be summarized as follows:

VALUE OF HELIUM
PRIVATE EXTRACTING PLANTS—
HUGOTON AREA

Since the 1960 Helium Act Amendments, three private extraction plants operating in the Hugoton area have supplied significant quantities of Grade A helium to commercial markets—the Kansas Refined Helium Company, Otis, Kansas, processing gas with approximate helium content of 1.30%; the Alamo Chemical Plant at Elkhart, Kansas processing gas of approximately .59% helium content; and the Sunflower Plant, at Scott City, Kansas, owned by Cities Service Cryogenics, Inc., and Helium, Inc., a

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27. Morton's figures were: [Tr. 15:1572, 1577]

1961—25 cents per Mcf	1967—35 cents per Mcf
1962—25	1968—37
1963—27	1969—39
1964—29	1970—41
1965—31	1971—43
1966—33	1972—45

Exhibits relating to producer's costs appear as Helex Exs. 301, 302, 304, 305 and 307.

subsidiary of Kansas-Nebraska Pipeline Company, processing gas containing approximately .50% helium.

Kansas Refined Helium Plant, Otis, Kansas

Gas processed through the Otis Plant comes from three different sources. [Tr. 1:76, 77]

1) Leasehold gas which the owner, George Angle, procured from his own gas wells drilled under the name of Frontier Oil Company; [USX 26, p. 105; Lippert v. Angle (1973) 211 Kan. 695, 508 P.2d 920]

2) gas purchased in 1968 from Kansas-Nebraska Natural Gas Company; [USX 27]

3) crude helium purchased from other extraction plants. [USX 28, 29; Tr. 13:1365; 19:2156-60.]

In Lippert v. Angle (1973), 211 Kan. 695, 508 P.2d 920, the Kansas Supreme Court determined that the actual "market value" at the wellhead of gas produced by Angle from the Reichel field in Rush County, Kansas was 13 cents per Mcf less certain BTU adjustments and cost of compression, from date of first production to February 1, 1967, and thereafter was 14 cents per Mcf. Angle's leases were secured during the 1960's in order to develop helium bearing gas reserves in sufficient quantities to support his liquid helium plant. Gas wells in the Reichel field had previously been connected to the Kansas-Nebraska pipeline gathering system, and gas had been processed for helium extraction by the United States in a plant operated by the government at Otis, Kansas from 1945 to 1968. More than 340 of Angle's royalty owners in the Reichel field executed Division Orders and Gas Purchase Agreements which provided for royalty payments on a value of 14 cents per Mcf. These Division Orders were specifically designed to

give Angle full title to all of the gas, including hydrocarbons and non-hydrocarbons.[28]

The second source of gas for Angle's Kansas Refined Helium Plant at Otis was gas purchased from Kansas-Nebraska Pipe Line Company, under contract dated March 5, 1968. [USX 27] The value agreed to for the right to extract helium from this gas was the "Industrial Interruptible Tariff (Schedule 7-1) established by the State Corporation Commission of Kansas. The tariff rate in March, 1968, ranged from 22 cents to 60 cents Mcf, depending on the volume involved. [USX 42] This gas was returned to Kansas-Nebraska after processing through the Otis Plant and sold in intrastate commerce. This gas was not subject to regulation by the Federal Power Commission. [See Depo. S. D. Ford, Jr., USX 33 pp. 5, 6, 18-22, 53] As to this gas, Kansas Refined Helium was not required to pay any more for the gas than would any other industrial user.[29]

The third source of helium used by Kansas Refined Helium at Otis, Kansas, was crude helium purchased from the Helex companies involved in this action. Kansas Refined Helium paid about $12.45 per Mcf for crude helium purchased from the National Helium extraction plant at Liberal, Kansas, and $9.50 per Mcf for crude helium purchased from the Northern Helex conservation plant at

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28. Comparable payment for right to extract helium at wellhead, if helium content was only .4% instead of 1.8% (as in the Reichel Field) would be 3 cents per Mcf of helium removed. [CSX 22; Bowers, 16:1687 et seq.]

29. Comparable payment for right to extract helium from a .4% gas stream, instead of a 1.3% helium gas stream, as was the content of the Kansas-Nebraska gas, would be 34 cents per Mcf of helium removed. [CSX 22]

Bushton, Kansas starting in 1971. [USX 28, 29; Tr. 13:1365; 19:2156-60; 2:226, 227][30]

The Greenwood Plant, Alamo Chemical Company Elkhart, Kansas

The Greenwood plant is a 50-50 joint venture of Alamo Chemical Company, subsidiary of Phillips Petroleum Company, and Gardner Cryogenics, which produces Grade A helium in liquid and gaseous form. The total gas supply for this plant comes from Colorado Interstate Gas Company, and contains about .59% helium content. The gas sales agreement for this gas, dated April 1, 1965, between Alamo Chemical and Colorado Interstate appears as USX 25. This agreement grants Alamo the right to process gas and "to extract, take, own and dispose of all helium" contained in the gas, as well as to extract and own liquid hydrocarbons from that gas. Payment provisions cover both of these extraction rights: [USX 25, p. 26]

> "Two Dollars ($2.00) per Mcf for the contained helium extracted and saved at the Greenwood Plant . . .;"

and,

> "for the volumes of shrinkage, fuel, vent gas and helium concentrate used or disposed of by Alamo at the Greenwood Plant. . . . Twenty-one Cents (21¢) per Mcf. . . ." [Tr. 2d 20:2258][31]

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30. The Northern sale was to be f. o. b. Otis Plant, via the Bureau of Mines helium pipeline system. When the Bureau denied use of its pipeline, Northern was required to deliver the crude helium to Otis, Kansas in high-pressure gas trailers at a cost of 50 to 75 cents per Mcf. [Garwin, Tr. 226, 227]

31. Comparable payment for right to extract helium from a .4% gas stream processed at the conservation plants would be $1.22 per Mcf of helium extracted. [CSX 22; Bower, 16:1687 et seq.]

Sunflower Plant—Cities Service Cryogenics
Scott City, Kansas

All of the gas which contains about .50% helium, for this private plant, owned jointly by Kansas-Nebraska and Cities Service Cryogenics, is supplied by Kansas-Nebraska, which is paid a processing fee per Agreement dated 6/14/66, as amended by letter agreement of 4/4/67. [USX 5, 30, 31, and 32] This fee covers the right to process and extract both liquid hydrocarbons and helium, with payment being at the rate of $2.00 per Mcf of helium sold by the Sunflower plant, and shrinkage at the "price set forth in Kansas-Nebraska's Tariff No. 8-3 on file with the Kansas Corporation Commission." [USX 31, p. 10][32]

Kansas-Nebraska obtains about 25% of the Sunflower Plant gas from the nearby Bradshaw Field, which has a helium content of about .8%. [Ford Depo., Ex. 33, pp. 16, 25] The gas purchase contracts negotiated by Kansas-Nebraska in the Bradshaw field specifically provide for passage of title to the helium constituent.[33] [USX 40(a)-40(y); USX 41(a)(b)] Most of these contracts were signed between 1963 and 1965 and provided for a base price of 12.5 cents per Mcf for the total gas stream, escalating 1

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32. Comparable payment for right to extract helium from Hugoton gas of .4% helium content would be $1.13 per Mcf of helium extracted. [CSX 22; Bowers, 16:1687 et seq.]

33. e. g., USX 40(a), gas purchase contract, Kansas-Nebraska, Buyer, Texaco, Seller, dated 1/24/64, Article III, p. 9:

> "The gas shall be in its natural state as produced, including all hydrocarbon and nonhydrocarbon substances, *including but not limited to helium therein contained* and gasoline produced therewith, except that Seller shall have the right to retain such liquid hydrocarbon substances (inclusive of crude oil) as shall be separated by Seller from the production of the respective well or wells by means of conventional oil and gas separator equipment installed on the lease by Seller, in which event the delivery point shall be at the outlet of the separator." [Emphasis supplied.]

cent each five years to 15.5 cents per Mcf. Additional contracts were signed after 1965, one in 1970, with base price of 15 cents per Mcf [USX 40(y)]; and one as recently as February 3, 1972, which provided for a base price of 25 cents per Mcf [USX 40(u)].

Two of the Kansas-Nebraska Bradshaw Field contracts contained somewhat unusual language. The contract with Texaco, dated 1/24/64 [USX 41(a)] provided:

> It is recognized that the gas to be delivered hereunder contains helium and that Seller's ownership of such helium may be disputed. It is further recognized and agreed that in determining the price to be paid for the gas sold and delivered under this contract *that helium has been given a value of 1¢ x actual BTU/950 for each one thousand (1,000) cubic feet of gas.* Seller is hereby given the option, to be exercised in writing prior to the date of initial delivery to either: [Emphasis supplied.]
>
> (a) Accept payment in full of contract price as herein provided and assume full liability therefor under Article IX of this contract, or
>
> (b) Accept payment of the contract price as herein provided less the value of the helium (1¢ x actual BTU/950) and Buyer shall retain the amount attributable to the value of helium and assume the full liability for accounting to the owner of the helium (if said owner is not Seller) for the sum so retained."

The Kansas-Nebraska contract with Humble Oil and Refining Company, dated March 18, 1965 [USX 40(o)] contained the following provision under Article III, "Quality," p. 10:

> "Notwithstanding any other provision hereof to the contrary, it is recognized that litigation is now pending covering title to the helium constituent, if any,

of the gas, and it is understood and agreed that if it is finally determined that Seller did not have title thereto at the time of the execution of this contract, then Seller shall remove such helium constituent prior to delivery of the gas . . . or, failing to do so, shall indemnify Buyer, pursuant to the warranty provisions set forth in Article IX hereof. . . ."

PRIVATE EXTRACTING PLANT—ARIZONA AREA

Kerr-McGee Plant— Pinta Dome, Arizona

Kerr-McGee was the first private plant to have helium for sale after enactment of the 1960 Helium Act Amendments. Gas processed at this plant has about 8.4% helium content, is not suitable for fuel and is produced solely for the purpose of helium extraction. [USX 2, 5] This plant extracts Grade A helium in gas or liquid form, and has sold this at prices ranging from $19.00 to $35.00. [LPX 2-14; USX 70][34]

Part of the gas supply for the Pinta Dome Plant comes from the United States. Kerr-McGee pays a sliding scale price dependent upon helium content of the gas and the price Kerr-McGee is able to get for Grade A helium. [LOX 206, 1st trial] Assuming a $19.00 price for Grade A helium, with the raw gas stream containing 8%-8.49% helium, the price paid the United States would be about $2.88 per Mcf of helium removed.[35]

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34. In the early years of operation, Kerr-McGee's only competition was with the United States and so it was able to sell Grade A helium at the government price of $35.00; when other private extracting plants began sales, Kerr-McGee was forced to reduce its price to meet competition. The Otis plant started production in April, 1966; the Greenwood in December, 1966, and the Sunflower in October, 1968. [See USX 2].

35. The price paid private royalty owners is higher. Under a 1966 judgment of the Arizona Superior Court, the price to such royalty owners, with $19 sales price and 8%-8.99% helium content—is figured on a price of $4.38 per Mcf of helium removed. [See LOX 843, 1st trial]

It is substantially less expensive to remove helium from gas with a high per cent helium content than from gases with lower content, assuming the same plant size is involved. This is, of course, because a smaller volume of gas must be processed to obtain any certain quantity of helium. Witness Bowers calculated that a comparable payment for the right to extract helium from Hugoton gas processed at the conservation plants would be 15 cents per Mcf of helium extracted. [CSX 22, Bowers; 16:1687 et seq.]

VALUE OF HELIUM GAS SUPPLIES FOR BUREAU OF MINES' PLANTS

Discussion of the government's experience in obtaining gas supplies for its extracting plants appears in this Court's prior opinion, 292 F.Supp. at pp. 648-652.

Otis Plant, Otis, Kansas

This plant was constructed during World War II and gas was initially obtained from Producers Gas Company and Northern Natural Gas. When the plant reopened in 1951, additional gas was obtained under a 1952 contract with Kansas-Nebraska Gas Company. The prices in these contracts were the prevailing market prices for natural gas for fuel markets at the time of their execution.

In 1965, the Kansas-Nebraska contract was amended to provide the same price for contained helium as would be charged private users under the established Industrial Interruptible Rate. This plant was closed in 1968 because of a falling demand for helium. [Tr. 20:2308] At this time, the United States was paying the tariff rate set by the State of Kansas. 1% helium content; 10¢ Mcf base price [USX 43]; 15¢ base price [USX 44]; 19¢ Mcf effective 1/1/57 [USX 45]; base price adjusted to 16.97 cents Mcf

[USX 47]. [USX 48, Ford Depo., USX 33, p. 22]. After the plant was closed, Kansas-Nebraska sold the same gas to Kansas Refined Helium on the same price terms.

Exell Plant, Texas

This plant was constructed in 1943 and remained in operation until July, 1972. [USX 3] Gas was supplied by Colorado Interstate Gas Company, and up until 1958, the price paid was the prevailing market price for natural gas for fuel markets. [USX 52] In 1962, the contract with Colorado Interstate was amended to provide for a base price of 20 cents per Mcf for total shrinkage with provision for re-negotiation of price five years thereafter.

In 1968, and 1969, negotiations began concerning the price to be paid for contained helium removed from Colorado Interstate gas processed at Exell, with the Bureau of Mines suggesting a price of 50 cents per Mcf through June, 1969, with increases in succeeding years to $2.00 per Mcf in 1974 and thereafter. [USX 53] Colorado Interstate agreed essentially to this proposal [USX 55, 56]. This agreement was never formalized, due to "uncertainties in the future of the helium programs" [USX 57] and the United States finally terminated the Gas Processing Agreement with Colorado Interstate Gas Company, effective July 1, 1973. [USX 58, 59]

Keyes Plant, Oklahoma

The gas purchase contract with Colorado Interstate Gas, negotiated in 1958, is discussed at p. 651 of 292 F.Supp. and appears as LPX 2-34 in this record.

In this contract, the United States agreed to pay, in effect, $2.00 for the right to process sufficient gas to yield one thousand cubic feet of helium, plus 26¢ Mcf for shrink-

age.[36] Certain obligations were placed on Colorado Interstate in connection with payment of this fee. The helium content of this gas is about 2%. [USX 5] Dean Bowers calculated that a comparable price for extraction of one Mcf of contained helium in .4% helium gas would be 50 cents per Mcf of contained helium extracted. [CSX 22; Bowers, 16:1687 et seq.]

Navajo Plant, New Mexico

(See 292 F.Supp. at 650-651)

The initial gas supply for this plant came from the Rattlesnake Field, which gas contained 7.6% helium and was non-combustible. The well was drilled by Continental Oil Company under a lease granted by the Navajo Tribe. For purposes of computing a proper royalty for the Tribe, the Court of Claims placed a value on each Mcf of contained helium at $2.99 per Mcf of contained helium. [LPX 2-32, 2-30, 2-31] Navajo Tribe v. United States (1966), 364 F.2d 320, 334-338, 176 Ct.Cl. 502.

By 1955, the Rattlesnake Field was depleted and the United States contracted with Stanolind for gas produced from the Hogback Field in San Juan County, New Mexico. [LPX 2-33] This field contained gas with a 7.5% helium content and was not efficient as a fuel gas. The payment provided was 12 cents per Mcf for the gas stream, plus a 3 cent delivery charge. [LPX 2-33, ¶10, p. 5] This calculates to a payment of about $2.00 per Mcf of contained helium at the plant inlet, or, less delivery charge, about $1.55 Mcf at the wellhead.[37]

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36. ¶ 6.2 of contract, LPX 2-34, p. 5, provides for payment of 4¢ per Mcf for gas having helium content of 2%. Since 50 Mcf of gas would have to be processed to obtain 1 Mcf of helium, the processing fee amounts to $2.00 per Mcf helium recovered.

37. It would be necessary to process about 13 Mcf's of gas containing 7.5% helium to produce 1 Mcf of helium.

In 1959, the United States signed a contract with Pan American Petroleum Corporation covering gas produced from the Navajo C-1 well, having a helium content of about 5.6%. The price calculated for the helium content was essentially $2.00 Mcf, per the formula followed in the Keys contract. 292 F.Supp. at 652. [Tr. 1st 66:6318-6319][38]

In 1962, gas was purchased from Continental Oil Company from production in the Table Mesa Field. 292 F. Supp. at 650. The United States agreed to pay 23 cents per Mcf for the whole natural gas stream considering this price to contain a 11.27 cent payment for helium; the price for contained helium from this field would calculate to about $2.00, a price consistent with the "Keyes Formula." [Tr. 1st—66:6319-6320]

INTRASTATE SALES OF HELIUM BEARING NATURAL GAS

The evidence established that major intrastate sales of helium bearing natural gas were made at rates comparable to interstate sales which were subject to FPC rate schedules. [Hofsess 16:1765-1773; Morton 15:1612-1613; Arnold 21:2502]

Major Kansas purchases were:

Anadarko Production Company, 16.0¢ per Mcf, 1963 to 19.33¢ per Mcf in 1971 for wellhead purchases, and from 16.5¢ per Mcf in 1961 to 17.09¢ in 1971 for gasoline plant and field line purchases.

Kansas Gas Supply Corporation: 18.0094¢ Mcf in 1961 to 19.0737¢ in 1971 for wellhead purchases and from 13.0¢

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38. See also LPX 2-35; 2-36A, 2-36B. The price of 19¢ per Mcf was broken down as follows: 11.6¢ helium; 1.8¢ hydrocarbon, and 5.6¢ delivery.

per Mcf in 1961 to 17.24¢ per Mcf in 1971 for field line purchases.

Kansas Power and Light Company, paid 12.45¢ per Mcf in 1961 to 17.17¢ Mcf in 1971 for wellhead purchases.

Plateau Natural Gas Company paid 10.5¢ per Mcf to 13.0¢ in 1962 and from 12.5¢ to 19.0¢ per Mcf in 1971;

Kansas-Nebraska Natural Gas Company paid 10.0¢ to 12.0¢ per Mcf in 1961 and 10.0¢ to 15.0¢ per Mcf in 1971.

Major Oklahoma purchases were:

Arkansas Louisiana Gas Company paid 12.0¢ in 1963 to 13.0¢ per Mcf in 1971.

Oklahoma Gas and Electric Company 15.0¢ in 1965 to 16.0¢ per Mcf in 1971.

Oklahoma Natural Gas Company paid 12.25¢ in 1961 to 18.0¢ in 1971.

The Court considers such evidence of intrastate sales to be largely irrelevant to the question of the value of the contained helium which is the subject matter of these proceedings, inasmuch as these were sales of helium bearing natural gas for purposes of fuel, and none were shown to be related to any valuation of the helium content of the natural gas stream.

OTHER CONTRACTUAL RELATIONS

The Helex Companies and the United States presented evidence of other contractual negotiations during the 1960's in which the parties attempted to deal with the "value" of helium, or in which, it is suggested, that the parties recognized that the helium content of natural gas had no value above its volumetric value as a part of the whole gas stream. This evidence included:

Phillips Casinghead Gas Contracts

The Phillips Petroleum Company operates two helium extraction plants at Dumas and Sherman, Texas. The helium content of gas supplying these plants is somewhat higher than the .40 to .45% content of gas serving the Cities, Northern, and National plants since the Texas gas helium content ranges from .65% to .78%. [USX 5] Although casinghead gas was not being processed in Phillips' helium extracting plants, those holding casinghead gas contracts with Phillips were affected since operations at Dumas and Sherman would affect the "weighted average price" used in computing payments due under the casinghead contracts by approximately 1 cent per Mcf [USX 23; LPX 101; Tr. 20:2274] Since these pricing provisions depended upon a determination of the value of helium extracted by Phillips in May, 1962, the "value" proposed by Phillips was set at the figure of $2.35 Mcf.[39]

Several hundred holders of Casinghead Gas Contracts signed amendments or new contracts, spanning a period of 1962 to 1973,[40] containing the following provisions: [USX 23, Blank contracts ¶ 8]

> "The price received by Buyer and its subsidiaries from any sale of helium as a separate product (whether sold separately or contained in a helium gas mixture in which helium is the product for which payment

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39. In a letter to holders of casinghead gas contracts dated 5/14/62, Phillips stated: [LPX 101; USX 23]

> "In our negotiations with the U. S. Bureau of Mines for the recovery of helium at Dumas Plant the value for recovered helium was considered to be $2.35 per Mcf."

40. Those signing included: Socony Mobil (1962); Gulf Oil (1962, 1973); Cities Service Petroleum Co. (1962); Cities Service Oil Co. (1966); Sinclair (1969); Continental Oil Co. (1972); Pan American (1968); and Amoco (1973).

is made) shall be deemed to be $2.35 per Mcf of helium contained in any delivery of helium or helium-gas mixtures, without deduction therefrom."

Such provision only resulted in a value of ⅔ of $2.35 being placed on the helium extracted (the holder of casing-head gas contract only received ⅔ of "weighted average price"), or approximately 1 cent per Mcf of the whole gas stream containing helium in the natural, commingled state. [USX 23, ¶ 7B; Cullender, 20:2262-2274]

Phillips Pioneer Production Company Contract

In 1964, Phillips entered into a gas exchange agreement with Pioneer Production Corporation, wherein Phillips was able to process Pioneer's gas through the Dumas Plant for both helium and hydrocarbon extraction. [USC 24]. Phillips paid Pioneer a "processing fee" of $2.00 per Mcf for the helium contained in the gas delivered by Pioneer and for the right to extract hydrocarbons, plus a shrinkage payment of 21 cents per Mcf.[41] The helium content of this gas was about 1%. When the United States ceased accepting crude helium deliveries from the Dumas plant, Phillips stopped paying Pioneer the $2.00 processing fee, and a new gas exchange agreement is currently being negotiated. [Cox, 20:2241-2249]

Contracts Filed With FPC Covering Helium

During the 1960's many gas purchase contracts in the Hugoton area which specifically provided for title to helium were filed with the FPC. (USX 39 consists of 25 miscellaneous contracts, and USX 40 contains 25 contracts relat-

41. In addition to right to extract helium and hydrocarbons, Phillips also received the right to return only 92.5% of the volume of gas initially received. [USX 24 (Article III, § 5 of 3/3/65)]

ing to the Bradshaw Field which supplies the Sunflower Plant. These contracts are summarized in USX 61). There is no provision in any of these contracts, with prices ranging from 6¢ Mcf to 25¢ Mcf, which called for an adjustment in price depending upon whether or not helium is extracted by either party.

Panhandle Eastern Contracts

Starting in 1960, Panhandle Eastern entered into a number of contracts with Lessee-Producers in which the helium content of the gas purchased was specifically mentioned. (Collected as USX 37(1), 37(14); summarized in USX 61).

Two of the contracts were with Ashland Oil [USX 37(1), 37(2)] made in 1960 and 1966. Under the first, Ashland reserved the option to extract helium, and if it did not, Ashland would "*release all* further claim to helium contained in gas delivered . . ." This contract made no difference in the price to be paid by Panhandle for the gas, whether or not the helium was extracted by Ashland. Ashland has not in fact ever extracted any helium. Under the terms of the 1966 contract [USX 37(2)] Ashland was either to remove the helium prior to delivery, or indemnify the Buyer. The initial contract price under both of these contracts was 16 cents per Mcf.

Panhandle's contracts with Mobil Oil and Cities Service Oil contained similar provisions relating to helium, with no adjustment of price, regardless of whether or not helium was extracted prior to delivery to Panhandle. The initial price under both of these two 1960 contracts [USX 37(4), 37(6)] was 17 cents per Mcf.

None of these Panhandle contracts made any distinction in the price to be paid whether or not helium was

removed by the Buyer or Seller, and all of these contracts covered areas having gas with a helium content of .4% or more. [See map, end of USX 61].

Atlantic-Richfield, ElPaso Gas Exchange

[USX 38(a)-38(h)]

By contract dated March 11, 1965, [USX 38(a)] Atlantic-Richfield's predecessor, Sinclair Oil, sold production from 39,000 acres in Grant and Stanton Counties, Kansas, to ElPaso Natural Gas. The agreement clearly gave ElPaso the right to extract non-hydrocarbons, and the initial price set for sale of the entire stream was 15 cents per Mcf.

"Processing Rights" granted in this contract [USX 38(a)] specifically provided that:

> "As part of the consideration set forth in Article XII "Price," Seller conveys to Buyer the right to process the gas covered hereby for the extraction and recovery of any and all of its hydrocarbon and nonhydrocarbon substances."

On the same date, ElPaso agreed to exchange this gas with Northern Natural Gas Company. [USX 38(f)] Northern was to pay back the gas from pipeline facilities in Yoakum County, Texas. The gas which has been delivered to Northern under this gas exchange agreement has been processed through either the Northern Helex Bushton conservation helium extraction plant, or through the private Sunflower helium extraction plant operation by Cities Service [See Tr. 14:1493, 1494, and discussion of this gas exchange agreement, *infra.*]

Prior to sale of this gas to ElPaso, the gas had been sold to Cities Service for 15 cents per Mcf, subject to refund, since the FPC guideline price for the area was

11 cents for old contracts. The parties tried to convince the FPC that the March, 1965 contract constituted a new sale since additional gas reserves were covered, and the right to extract helium had been conveyed. [USX 38(g), pp. 47, 48; USX 38(h), p. 24] The FPC accepted the price of 15 cents in August, 1967, but made that price subject to refund, noting that this was 1 cent below the "present area guideline for new contracts." [USX 38(h), p. 21]

Ashland Oil Company—Anadarko Proposed Contract

In 1965, Ashland Oil Company and Anadarko Production Company entered into a tentative contract for sale of helium bearing natural gas in Grant County, Kansas. The contract price was 13.5 cents per Mcf during the first five year period, and the parties attempted to resolve the question of title to helium in this manner: [USX 36, 36A, Warranty Clause, Article XIV]

> ". . . provided, however, it is recognized that litigation is now pending concerning title to the helium constitutent, if any, of gas, and it is understood and agreed that if it is finally determined that Seller did not have title thereto at the time of the execution of this Agreement, then Seller shall have the right to remove such helium constitutent delivered hereunder to Buyer."

This contract was never implemented, inasmuch as the FPC did not release Ashland's prior dedication of gas reserves to Cities Service [USX 38(h)]

Ashland Oil—Cities Service Arbitration Proceedings

In 1967 Ashland and Cities Service submitted for arbitration a gas sales contract dated March 12, 1948, which provided for periodic price renegotiation. [Ashland Ex.

5, 1st trial] The submission specifically recognized the problem of attributing a value to the helium content of the gas stream. The arbitrator, Mr. Gruy, by letter of March 29, 1967, found the fair, just and reasonable price of gas during a 5-year period ending June 22, 1971, to be 15 cents per Mcf. Mr. Gruy, in his deposition given in this case, stated:[42]

> ". . . as with the Ashland case I have never found that the helium had any value at the wellhead to the royalty owners or the producers.
>
> Q. Oh, you found that?
>
> A. I found it had no value other than its value per Mcf.
>
> Q. Part of the total stream?
>
> A. Yes."

K. *The Court's Determination of Value.*

In the foregoing discussion of the evidence the Court has attempted to summarize the factual background which bears upon the ultimate determination of value.

[1-3] In the first instance, the Court rejects the claimed values by Lessee-Producers for helium at the wellhead or central delivery points. It must be remembered that the basis of this Court's jurisdiction in interpleader is, in each case, determined by, and limited to, the "fund." The fund, in each case, has been defined as the proceeds received by each individual Helex company from the sale of crude helium to the United States, pursuant to the conservation contracts. The Court of Appeals itself real-

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42. The Gruy deposition is part of the record, but was not assigned an exhibit number. [See Tr. 22:2634, 2635; and Helex X 319; Tr. 2:233, 234]

ized that payments required relate only to the helium content of the processed gas: [441 F.2d at 723]

> "We do not intend that payment to the lessee-producers or royalties to the landowners should include anything for the helium content of the nonprocessed gas. The record does not show any market for the helium commingled with the nonprocessed gas."

The Court of Appeals specifically defined the interpleaded fund as being: [Dkt. 1938, Order on Costs]

> "The reasonable value at time of sale of the helium content of the natural gas which the Helex group has received from the Lessee-Producers, and which has been processed in the plants of the Helex group for the separation of helium from natural gas."

As previously noted, the sums paid by the United States to the Helex companies averaged within the range of $12.00 per Mcf for contained helium within the crude helium mixture. When the Lessee-Producers come up with figures indicating values of helium to be as high as $16.20 per Mcf after extraction processes in the National Helium Plant for the year 1967, it is immediately apparent that they are reaching for sums beyond the jurisdiction of this Court. This result is illustrated by tables found in proposed findings submitted by Cities Service Helex [Dkt. 1705, p. 9] which reflect that the demand of the Lessees exceeds gross revenues of Cities by $6.9 million, in the case of Northern Helex by $2.9 million, and in the case of National Helium, by $21 million. The Lessee-Producers thus claim a total of $30.8 million more than the three Helex Companies grossed from their sales of crude helium to the United States, while at the same time asserting that the Helex Companies have recovered their costs of extraction and a rate of return on their investment.

In the opinion of the Court, the values set by the Lessee-Products rest upon two erroneous premises: first, that the first market and sale of contained helium is that found in the market for Grade A helium which sold at prices ranging from $19.00 to $35.00 per Mcf; and, second, that the contracts of the Helex group with the Bureau of Mines, under the conservation program, were some sort of "open end" contracts, which would allow unlimited escalation of the price to be paid by the United States for crude helium.

In the first instance, the Court is of the opinion, and so finds, that for the purpose of this case, there were markets for the commingled helium as it passed from the wellhead to the pipeline companies, and from pipeline companies to the government, private, and conservation helium extracting plants.

In the second instance, the Court continues to believe that provisions in the conservation contracts relating to indemnification by the United States to the Helex Companies for sums beyond an approximate $3.00 per Mcf title liability exposure limit, continue to be just that— indemnity arrangements between the Helex group and the United States, which inure solely to the benefit of the Helex group and not to third parties. The Court has therefore determined that any indemnity arrangements which exist between the government and the Helex group are irrelevant to the question of determining "reasonable value" of the commingled helium in question.

The fallacy of the Lessee-Producers' theory of value is further illustrated in its application. [See Tr. 7:760; 8:869]

If one would assume, according to witness Dunn's figures, that the value of helium is $14.00, and that the

United States would pay all but $3.00 of that value under the purported "escalation clause" appearing in the conservation contracts, then the United States would ultimately pay an additional $11.00, plus the $12.00 the government has already paid for crude helium, for a total of $23.00 payment for *crude helium*, when the witness Dunn had already set a value of $20.00 for Grade A helium as the starting point in his own computations.

Another example of the application of Dunn's computations reveals that since the costs of extracting helium in each plant were reduced by a portion of the profits made in that plant from extraction of liquid hydrocarbons, this increased the ultimate "value" figure attributable to the commingled helium. This means, of course, that portions of these hydrocarbon profits will be going to the Lessee-Producers, and that, assuming that the United States will ultimately pay values above the $3.00 figure, those profits would be paid from the government treasury.

Finally, the Court can only say that the Lessee-Producers' theory of arriving at value is simply unreasonable and that determinations of the value of "raw materials" is not determined upon a "proceeds less expense" theory in the American economy. The price that a farmer receives for wheat, or the price that he receives for feed grains is not determined by "working back" from the retail price of bread or meat. This was illustrated in the testimony of Dr. Morton, an economist in the following terms: [Morton 15:1596, 1597]

> ". . . one does not find the value of, say, wheat in Kansas, by taking the price of bread, deducting from the price of bread the grocer's profit, and then the drayman's profit who hauls it to the grocer, then the baker's profit, and then the miller's profit, plus his

> costs, and the railroad's profit in hauling it to the mill, plus its costs, in order to find the price of wheat."

and, in the case of cattlemen:

> "I want a certain compensation for my work and effort and capital in feeding cattle, therefore, I am only getting 40 cents instead of 50 cents, I expect the fellow who sold me the feed grains to take a reduction now in his price that we paid him. Well, it doesn't work that way in our system."

[4] The Court likewise feels that the question of "value" should not be arrived at by means of determining what the profits and rate of return to the Helex Companies and/or the Lessee-Producers *"ought to be."* It is no part of the Mandate of this Court to assume rate-making jurisdiction over the private helium industry.

[5] The Court further concludes that it must reject the contention of the Helex Companies that reasonable value is to be determined according to the existing gas purchase contracts between Lessee-Producers and the pipeline companies. The Court can only say that it believes this result is required by the Mandate of the Court of Appeals, and the interpretation of the *Grounds* opinion in Phillips Petroleum Company v. Texaco, *supra,* 415 U.S. 125, 129, 94 S.Ct. 1002, 1004, 39 L.Ed.2d 209, 213.[43]

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43. The appellate court disposed of the Helex companies' contention regarding the applicability of the gas purchase contracts by its comments found at p. 719 of 441 F.2d in which it concluded that this Court's opinion regarding the parties' right to contract with reference to helium was "startling" when this Court found that § 11.

> "'. . . does not *require* that persons contracting for the sale of gas contract separately for the sale of the helium constituent. It merely permits them to do so, and, when they have not, the contract must stand as it is written.' 292 F.Supp at 680."

(Continued on following page)

The Court fully appreciates and accepts evidence offered by the Helex Companies and the United States concerning the relationship between supply and demand for helium bearing natural gas in the Hugoton area during the 1960's, which evidence established to the Court's satisfaction that, viewed in the abstract, commingled helium in helium bearing natural gas has no value above its volumetric value. Simply stated, it had no value unless it was extracted from the whole gas stream.

The Court believes that the situation with respect to commingled helium in the Hugoton area was best explained by witness Clark, an economist, in the following terms: [11:1143]

> "Thus, prior to the sixties helium had zero value in the Hugoton-Anadarko area and if, in fact, the government does terminate the contracts in the future helium will have zero value and in the sixties half of the helium in the flowing gas had zero value, which means to me that helium is a commodity surrounded in time and space by zero value over and above its volume value."

Be that as it may the Court, however, must agree with the contention of the Lessee-Producers that the task of this Court, upon remand, was not to set a value upon *helium bearing natural gas*. Our task is to value the com-

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Footnote continued—

In explaining this conclusion, the appellate court stated, at p. 722 of 441 F.2d:

> "The activities of the Little Red Hen were not those of a public utility, and neither the product nor the ingredients thereof were subject to governmental rate regulation. Therein lies the difference. In our opinion private contract law and the principles applicable thereto are not controlling. This makes it unnecessary for us to delve into the many cases and texts bearing on the respective rights of parties to private contracts."

mingled helium which was in fact extracted from the natural gas stream. This is the subject matter of these interpleader suits, the Court of Appeals has determined that the Helex Companies obtained this commodity without paying for it, and that the Lessee-Producers and Landowners are entitled to payment for the reasonable value of the contained helium. This Court must operate under the Mandate of its appellate court which has determined that payment must be made: [441 F.2d at 723]

> "The claim of the lessee-producers is that the Helex companies have received the gas without paying for the helium content. In ordinary circumstances restitution or rescission might be an available remedy. Here, neither is practical or legally possible, *but when payment is required and not made, the title fails just as surely as it does where either restitution or rescission is appropriate.*" [Emphasis supplied.]

In arriving at its value figures, this Court has carefully considered evidence pertaining to sums of money which both government, private, and conservation helium extracting companies were willing to pay pipeline companies and producers or royalty owners for the right to extract commingled helium from natural gas streams, as discussed *supra*, in this opinion. An expert witness, Dean Bowers, evaluated contracts and agreements under which the government Keyes plant, and the private extracting plants operated by Kansas Refined Helium, Alamo Chemical Company, Kerr-McGee Company and the Cities Cryogenics-Kansas Nebraska Sunflower Plant obtained gas supplies for their operations. He made certain adjustments according to helium content of the gas supplying each plant, and made certain calculations determining values of rights and duties involved in these agreements, and determined that the average payment for contained helium

made by these commercial helium extraction plants averaged 61 cents for all plants, and averaged 75 cents for private plants which had no connection with the United States government. [Bowers 16:1687 et seq.; Cities Helex Ex. 22]

[6] After review of all of the evidence, it is the finding of this Court that the reasonable value of the helium component of the helium bearing natural gas, at the point that it was delivered by the Lessee-Producers to the pipeline companies, which helium was thereafter processed and extracted by the three Helex Companies involved in this litigation, and which was thereafter sold to the United States pursuant to the three conservation contracts, is as follows:

1961	60 cents per Mcf of helium
1962	61 cents per Mcf of helium
1963	62 cents per Mcf of helium
1964	63 cents per Mcf of helium
1965	64 cents per Mcf of helium
1966	65 cents per Mcf of helium
1967	66 cents per Mcf of helium
1968	67 cents per Mcf of helium
1969	68 cents per Mcf of helium
1970	69 cents per Mcf of helium
1971	70 cents per Mcf of helium
1972	70 cents per Mcf of helium

L. *Allocation of the Fund.*

Now that the Court has arrived at value figures, it is necessary to make some further determinations concerning those parties who are entitled to share in the distribution of the fund.

[7] As a preliminary matter, the Court will state that it will be governed in these determinations by two essential guidelines:

First, the Mandate of the Court of Appeals which, in the Court's opinion, requires that the Helex Companies account for all helium which was extracted in their respective plants, and thereafter sold to the United States, pursuant to the conservation contracts. They are not accountable *in this action* for helium bearing natural gas which was bypassed around the plant, for helium bearing natural gas which was consumed as fuel within the plant, or for helium which was extracted and then vented into the atmosphere, or for helium which was extracted and sold to parties other than the United States, or for helium which was extracted and then stored for their private account.

Second, the Court is mindful of the definitions of the classes of Lessee-Producers and Landowners who have an interest in the funds which are the subject matter of these interpleader suits. For instance, in the National Helium litigation, Case No. KC-1980, the class of Lessee-Producers is defined as those persons, firms and corporations who own leasehold interests in oil and gas leases who "deliver, have delivered or will deliver helium contained in gaseous streams *directly or indirectly* to Panhandle Eastern Pipe Line Company, which helium has been, is being, or will be removed and delivered by . . . National Helium Corporation into the Possession of the United States of America at the delivery point described in that certain contract between the United States and National Helium Corporation dated October 13, 1961." [Emphasis supplied.]

Likewise, the class of landowners in the National Helium case has been defined as those persons and corpora-

tions owning a mineral interest in land "from which helium has been, or is being, or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being, or will be taken into possession by the United States . . . in Seward County, Kansas," pursuant to the contract between the United States and National Helium Corporation dated October 13, 1961.

1. *Status of Atlantic Richfield Company; Northern Natural Gas Company and ElPaso Natural Gas Company Gas Exchange Agreement.* [USX 38(a), 38(h); Hanley 14:1487 et seq.]

Northern Natural Gas Company received gas from ElPaso Natural Gas Company in north-central Grant County, Kansas, under the terms of a gas exchange agreement dated March 11, 1965.

This gas had previously been purchased by ElPaso from wells in the Hugoton Field owned by Atlantic Richfield Company. Northern Natural Gas, itself, had no contractual relationship with Atlantic Richfield.

Northern Natural Gas Company repaid ElPaso for this gas by delivery of equal amounts of gas to ElPaso in Yoakum County, West Texas.

About 8 or 9 miles directly north of where Northern Natural Gas received gas from ElPaso, some of the ElPaso gas is diverted for delivery to Kansas-Nebraska Pipeline Company, in exchange for other gas received by Northern from Kansas-Nebraska near the Liberal compressor station in Seward County, Kansas. This delivery to Kansas-Nebraska includes part of the Atlantic Richfield gas.

The Kansas-Nebraska pipeline goes on North to Scott City, where it serves the private Sunflower helium extraction plant owned by Cities Cryogenics.

Part of the gas received from ElPaso is processed through the Northern Helex plant at Bushton, Kansas, and part is processed for helium extraction through the private, non-conservation Sunflower Plant at Scott City, which is partially owned by Kansas-Nebraska. Some of the ElPaso gas is also used as compressor station fuel at Holc mb and Burdette, Kansas, and is never processed by anyone for the extraction of helium.

[8] The Court fully apreciates the complex nature of these arrangements, but the Court is of the opinion, and so finds, that Atlantic Richfield has established to the Court's satisfaction that a portion of its production was in fact processed at the Northern Helex plant in Bushton, Kansas, that helium was extracted from gas produced by Atlantic Richfield, and that that helium was thereafter sold to the United States, pursuant to the contract between Northern Helex and the United States. Under such circumstances, the Court finds that Atlantic Richfield is within the class of Lessee-Producers, defined in Case No. KC-1969, who delivered "helium contained in gaseous streams *directly or indirectly* to Northern Natural Gas Company" from which the helium was removed by Northern Helex and delivered into the possession of the United States pursuant to the conservation contract, dated August 15, 1961.

[9] Northern Helex must account to Atlantic Richfield only for that portion of gas which passed through the Northern Helex plant. Atlantic Richfield is not entitled to any payment in this action for the helium content in portions of gas which were diverted to Kansas-Nebraska and thereafter processed in the Scott City extraction plant, or for portions of its gas which may have been consumed as fuel in compressor stations. While computations necessary to ascertain what portion of the Atlantic Richfield gas was ultimately processed for extraction of helium at

Bushton, Kansas may be difficult, the Court does not believe that these computations are impossible, and the Court expects the parties to cooperate in arriving at ultimate figures, in accordance with its discussion, *infra*, concerning proper accounting procedures. Atlantic Richfield will, of course, be accountable to its landowners for payment of proper royalties attributable to payments received for the helium constituent extracted at the Northern Helex plant.

2. *Panhandle-Eastern Gas Exchange Contracts.*

[10] As previously noted, Panhandle Eastern obtained large volumes of gas under 22 gas exchange agreements with various producers and other pipeline companies. [PEX 2, Contracts Nos. 9001 through 9022][44] The Court has examined these gas exchange contracts in some detail and will agree with Panhandle's contention that they are quite complex, and contemplate an exchange of gas for gas, apparently for convenience and without any particular profit motivation. However, Panhandle-Eastern admits that a large volume of the gas serving the National Helex plant was obtained by Panhandle through gas exchange agreements,[45] and it is readily apparent that helium was extracted from that gas and sold and delivered

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44. Gas exchange agreements were made with Cities Service Gas Company, Colorado Interstate Gas Company, ElPaso Natural Gas Company, Kansas-Nebraska Natural Gas Company, Natural Gas Pipe Line Co., Northern Natural Gas Company, Phillips Petroleum Company, Anadarko Production Company, Trans-Western Gas Interstate Company, and Peoples Natural Gas Company.

45. In its post trial brief (Dkt. 1703, p. 89) Panhandle asserts that nearly one-half of the volume of feedstock to the National Helex plant was derived from exchange gas, gas acquired from Phillips Petroleum Company, and gas acquired from Panhandle's own wells.

to the United States pursuant to National's conservation contract.

The Court accordingly finds, as it did in the case of Atlantic-Richfield, that those Lessee-Producers who delivered helium bearing natural gas, *directly or indirectly* to Panhandle Eastern Pipe Line Company, pursuant to these gas exchange agreements, from which helium was thereafter removed by National Helex and sold and delivered to the United States, are members of the Lessee-Producer class defined in Case No. KC-1980. The Court notes that each gas exchange agreement is specifically tied to production from named wells, and while the accounting may be difficult, the Court does not believe it to be impossible. As in the case of Atlantic-Richfield, those Lessee-Producers entitled to share in the fund derived from sales of crude helium by National Helex, shall account for and pay proper royalties to landowners in accordance with this Court's instructions.

3. *Production From Wells Owned by Panhandle Eastern.*

[11] As previously noted, approximately one-third of the gas which was processed for helium extraction at the National Helex plant was produced from wells owned by the pipeline company which supplied National, that is Panhandle Eastern. As to this production, Panhandle contends that "any claims by the landowners who were lessors to Panhandle are outside the jurisdiction of the Court in this case."

It is the finding of this Court that the Landowners owning mineral interests in lands from which Panhandle Eastern produced helium bearing natural gas, which was ultimately processed for the extraction of helium in the

National Helex plant, are clearly within the class of Landowners defined in Case No. KC-1980.

The Court further finds that Panhandle Eastern itself, willingly, or unwillingly, comes within the definition of the class of Lessee-Producers entitled to share in the fund derived from sales of crude helium to the United States by National Helex, since it in effect delivered gas to itself from which helium was extracted and sold to the United States.

It does not matter to this Court what Panhandle Eastern does with proceeds payable from its own subsidiary, National Helex, upon an accounting for payment for the helium constituent of gas derived from its own production. However, as a Lessee-Producer, supplying gas which found its way through the National Helex plant, it must make proper accounting for royalties due its landowners for the value of extracting helium. To rule otherwise would enable National Helex to avoid accounting for the value of approximately one-third of the helium sold to the United States, which would in the Court's opinion, violate the intent of the Mandate of the Court of Appeals, and would only invite further decades of endless litigation.

4. *Producers Who Disclaimed Interest in Helium.*

a) *Panhandle Eastern Contracts Nos. 152, 284, 435, 767, 919, 978* [PEX 2]

[12] Panhandle Eastern is the purchaser of gas under six contracts in which the sellers retained the right to extract the helium content of the gas stream, and waived claim to the helium or promised indemnity in the event they failed to exercise their option. These contracts appear in PEX 2, as follows:

Contract No. 152, 3/24/60 with Cities Service Oil Company

Contract No. 284, 5/19/66, Ashland Oil & Refining Company

Contract No. 435, 4/14/67, Cabon Corporation

Contract No. 767, 1/22/60, Republic Natural Gas Company, now Mobil Oil Corporation

Contract No. 919, 4/6/60, United Producing Company, Inc. now Ashland Oil & Refining Co.

Contract No. 978, 7/3/63, Texaco, Inc.

In Contract No. 152, the producer retained the option of extracting helium and liquefiable hydrocarbons, and promised that: "In the event Seller does not extract helium at the plant site or sites . . . or prior to initial delivery of gas to Buyer, Seller will release all further claim to helium contained in gas delivered to Buyer." [Contract No. 152, ¶ 12.3 p. 24]

In Contracts Nos. 435, 767 (¶ 12.3), and 978, the producers also retained the right to extract helium, and these contracts contain provisions similar to that found in Contract No. 152, releasing all future claim to helium.

In Contract 284 (¶ 15.1, Warranty of Title) the producer agreed to "remove the helium constitutent prior to delivery of the gas . . . or, failing to do so, shall indemnify Buyer pursuant to the warranty provisions hereof, for all gases, of whatsoever nature, actually delivered to Buyer."

In Contract No. 919 (Article II, ¶ 2.1(f)) the producer retained the option to extract helium and/or liquefiable hydrocarbons, but has failed to exercise this option in any way. Surprisingly, none of the producers in any of these six contracts has elected to construct a $20 million

helium extraction plant for the purpose of removing helium for its own account, prior to delivery of the gas stream to Panhandle Eastern. [Dixon 19:2068-2073]

All of the Lessee-Producers who sold gas to Panhandle pursuant to these six contracts are members of the Lessee-Producer class defined in the National Helex interpleader case, No. KC-1980. This Court determines that they are entitled to share in the allocation of the fund derived from sales of crude helium to the United States by National Helex, notwithstanding provisions contained in the gas purchase and sales contracts described above.

The Court believes that this result is required under the Mandate of the Court of Appeals. The title question of this helium case is closed insofar as it has been determined that the oil and gas leases, and the gas purchase contracts conveyed title to the helium constituent of the natural gas stream to the Helex Companies. The Court of Appeals has ruled that the Helex Companies have received a valuable commodity without paying for it, and that, the pipeline companies and their Helex subsidiaries may not retain their "windfall." We believe that justice requires that the Helex Companies be accountable to Lessee-Producers in situations similar to that found in these six contracts. It is obvious to the Court that the economics of the helium industry are such that no producer in a similar situation will be able to extract helium for its own account, before delivering gas over to the pipeline company. It is also apparent to the Court that the language appearing in these contracts was inserted simply to protect the pipeline company's title to the helium constituent, which title, as the Court well remembers, was a matter of considerable concern and controversy during the 1960's when these gas purchase contracts were negotiated.

b) *Status of Phillips Petroleum Company Cases Nos. KC-1969 and KC-1980.*

Panhandle Eastern obtains large volumes of gas under purchase contracts with Phillips Petroleum. The Court has previously ruled that Phillips is a member of the Lessee-Producer classes in Cases Nos. KC-1969, KC-1980, despite its efforts to remove itself from litigation. [Dkt. 1614].

Again, in light of the Mandate of the Court of Appeals, and in accordance with the discussion, *supra*, relating to releases of claims to helium, the Court concludes that Phillips, as a member of the Lessee-Producers class, is entitled to share in the funds derived from sales of crude helium to the United States by National Helium and Northern Helex, notwithtsanding Phillips' oral and written statements of position made during the previous trial and controversy concerning title to the helium constituent.

c) *Release by Hugoton Production Company*

[13] Panhandle purchased large volumes of helium bearing natural gas from Hugoton Production Company under the terms of a gas purchase contract dated May 1, 1962. [PEX 2, Contract 1500] A dispute arose between the parties, which was finally resolved by execution of a release dated May 1, 1967, wherein Hugoton released Panhandle and others from any and all claims whatever that Hugoton may have had, "from the beginning of the world" up to the date of the release.[46]

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46. Hugoton released Panhandle:

"from all, and all manner of, action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, judgment, execu-

(Continued on following page)

As in the case of contracts wherein producers specifically released claims upon helium, the Court determines that the release executed by Hugoton Production Company does not bar it as a member of the Lessee-Producer class who delivered gas to Panhandle Eastern Pipeline Company which was subsequently processed for helium extraction in the National Helex plant, and National Helex will be required to account to Hugoton Production Company notwithstanding the release executed for the benefit of Panhandle Eastern.[47]

d) *Counterclaims of Pipe Line Companies.*

[14] Cities Service Gas Company and Northern Natural Gas Company, for themselves, or for the account of their subsidiaries, the Helex Companies, seek set-offs against sums payable to Lessee-Producers in amounts attributable to the volumetric measure of helium contained in the natural gas stream. It is the position of the pipeline companies that they have already paid the Lessee-Producers for all volumes of natural gas, including the helium constituent, and that they are entitled to subtract amounts already paid under FPC service rates which are attributable

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Footnote continued—

tions, claims and demands whatsoever, in law or in equity, that the said Hugoton now has, ever had, or may have by reason of any matter, cause or thing whatsoever from the beginning of the world up to and including the end of the day upon which this release is dated. . . ."

47. The Court's determinations made upon special issues raised by Panhandle Eastern concerning National's accountability for gas produced from the pipeline's own wells, and for gas received and processed through gas exchange contracts, will apply equally to parties similarly situated in the other interpleader suits.

The Court's determinations with reference to releases, and language appearing in gas purchase contracts releasing claims to helium will likewise apply to those similarly situated in all of these interpleader cases.

to this helium constituent. Thus, in proposed findings submitted by the Cities Helex group, Dkt. 1705, p. 84, it is asserted that they are entitled to a credit of $29,543.51 for helium production during the period of July 1963 through December 1971.

The Court determines that these counterclaims should be disallowed.

The Court believes that prices paid by the pipeline companies under the gas purchase contracts, for the whole gas stream are irrelevant to a determination of the liability of the Helex extracting companies to account for the reasonable value of helium which was sold to the United States. Theoretically at least, the Helex extractors, and the pipeline companies are separate entities, and the rights of each were governed by separate contractual arrangements. In the case of the pipeline companies, by the gas purchase contracts; in the case of the Helex group, by their separate processing agreements with the pipeline companies. In the title phase of this litigation, it was determined that the pipeline companies obtained title to all of the components of the natural gas stream upon payment of rates specified in the gas purchase contracts or determined by FPC area rates. The pipeline companies bought the *entire* gas stream and the Court finds that they are not entitled to a "refund" of a portion of the purchase price which may be attributable to the helium constituent of that stream.

M. *Accounting Procedures.*

[15] While varying from field to field and well to well, the helium content in the gas produced from a given well remains fairly constant over the years. [Russell 9:957-958]

While testing data was not available from every well affected, the Court accepts evidence offered jointly by the Lessee-Producers and Landowners as reasonably establishing the helium content of the gas at the wellheads or central delivery points here involved, either as a result of tests of the helium content at such point, or by accepted engineering and geological practices. In this respect, the Court accepts and incorporates by reference in these findings, the relative percentages of volumes of helium reflected in "helium content maps" appearing as Landowners Exs. 2-1, 2-1A, 2-2, and 2-2A, and as sponsored by the witness Russell, 9:955 et seq.

Although the helium content of gas produced from various wells upstream from central delivery points, such as the tailgate of a gasoline plant, or at the end of a gathering system, have not been determined in every instance, the Court expects the parties to be able to determine helium percentages by similar methods without difficulty. [Russell 9:964-965]

The Court likewise accepts and incorporates into these findings, evidence offered by the Lessee-Producers and Landowners allocating volumes of extracted helium back to Lessee-Producer delivery points. This evidence consists of computer runs appearing as Lessee-Producer Exhibits 2-26A through 28G. The Court finds that these exhibits reasonably and fairly allocate to each of the described delivery points the extracted volumes of helium which have been delivered to the United States for the period 1963 through 1971 under the conservation contracts. [Dunn 6: pp. 638-670; 7: pp. 675-687] The Court expects the parties to resolve between themselves any errors or discrepancies which may appear in Lessee-Producers exhibits occasioned by erroneous information supplied by

the Helex Companies. E. g., McEntire 19:2169-2176; PEX 8, 10, 66.

The value of the helium at each delivery point is to be determined by multiplying the yearly volume of helium delivered at such point by each Lessee-Producer, and subsequently sold (as shown by such computer runs) times the value of commingled helium as heretofore determined for each year.

In most instances, the delivery points shown on the computer runs are wellhead delivery points. In a few instances, the delivery is made from the outlet of gathering systems, or gasoline plants. In such latter instances, wellhead allocations not now made, shall be calculated by the same methods and formulae already utilized. [Dunn 7: p. 687]

N. *Royalty Payments.*

[16] In its prior opinion, the Court discussed the oil and gas leases pertinent to this controversy. At the time they were executed, both the landowners and the producers were equally ignorant of the presence of helium in natural gas.

The gas royalty percentages in the leases arose out of the economics of ordinary natural gas operations, and reflect historical costs and returns, including a consideration of values of natural gas used principally as a fuel. Royalties under oil and gas leases vary according to the risk assumed, and rewards to be expected by the lessee. The evidence shows that nationwide royalty rates vary from 10% to 95%, based upon the expectations and bargaining power of the parties involved. In the Hugoton Field, royalty rates have gone as high as 9/16ths. [Keplinger 9:984-993]

In the Pinta Dome Field in Arizona, the United States, occupying the position of a knowledgeable landowner, obtained a royalty of 60% on gas useful only for helium. [Keplinger 9:994]

The helium wellhead values which the Court has here established are attributable to two factors: 1) the existence of underground deposits of helium, and 2) the leasehold production. The landowners have contributed the helium in the deposit, and the producers have contributed their efforts in producing the commodity as a part of the natural gas stream. The helium involved in this litigation became available as a valuable commodity only as a result of the two factors—the existence of the helium deposits, and the producer's reduction of the deposit to possession.

In the absence of any evidence indicating that there were appreciable additional producer costs attributable to the value of the helium here involved, the Court determines that a royalty of 50% is a reasonable measure of the respective contribution of the landowners-lessors in these actions.

In any event, a helium royalty of 50% is fair and reasonable under all of the circumstances, and the Court finds that such royalty is necessary and sufficient to prevent undue enrichment of Lessee-Producers upon distribution of the fund representing the reasonable value of commingled helium which was extracted and sold to the United States by the Helex companies in these actions.

O. *Interest.*

[17] After remand of these cases by the Court of Appeals, the object of this phase of the litigation is to assure that just compensation be paid to Lessee-Producers and to

their respective royalty owners for the helium in the gas processed by the Helex Companies. The Court believes that an award of prejudgment interest is required in order to assure this result.

In Lippert v. Angle, *supra*, 211 Kan. 695, 508 P.2d 920, the Court held that lessors were entitled to such interest at the rate of 6% per annum on royalties due from the time of their accrual. In Navajo Tribe of Indians v. United States, *supra*, 364 F.2d 320, 345-346, the Court found that property had been taken without just compensation, and awarded interest on additional payments found to be due the Tribe for its interest in the helium bearing natural gas in the Rattlesnake Field. In Phillips Petroleum Co. v. Oldland (10th Ci.. 1951), 187 F.2d 780, the Tenth Circuit sustained the power of the district court, in the exercise of its discretion, to award interest upon equitable considerations, ruling that the mere fact that the validity of a claim was in dispute did not preclude recovery of interest.

Under the circumstances present in this litigation, the Court finds that an award of interest at the rate of 6% per annum on the reasonable value found for each plant for each year, should be awarded.

CONCLUSIONS OF LAW

1. The Helex Companies are accountable in these interpleader actions for the reasonable value of that helium which they have extracted and delivered to the United States under the conservation contracts.

In the case of Northern Helex, the accounting shall include all deliveries of crude helium to the United States through the first 27 days of March, 1971, and payments received by Northern from the United States of $8,671,-631.99, on or about January 14, 1971, and of $2,285,872.87,

on or about June 23, 1971, which this Court deems to have been paid for deliveries of crude helium pursuant to the conservation contract.

2. Each Helex company shall account on an annual basis for the reasonable value of commingled helium as hereinbefore determined, and in accordance with these findings and conclusions and shall deposit in the registry of this Court the sums reflected to be due by such accountings, upon the entry of judgment herein.

3. Interest at the rate of 6% per annum is awarded on the reasonable values found for each plant for each year, from the end of each year to date of judgment herein and 8% thereafter until judgment is paid.

4. For the purposes of ultimate accounting for sums due individual members of the classes of Lessee-Producers in each interpleader case, the points of delivery, the method of measurement, and the adjustments in price from time to time for the helium component of the helium bearing natural gas here in controversy are fixed by the terms of the respective gas purchase and sales agreements between the Lessee-Producers and their pipeline purchasers. In the case of helium bearing natural gas which was indirectly delivered to the pipelines involved in this litigation, the points of delivery, and method of measurement shall be fixed by the terms of the respective gas exchange agreements between the parties to such gas exchange agreements, or under such instruments as may have given over possession of such gas to these pipeline companies.

Determinations made on final accounting of sums to be awarded individual members of the Lessee-Producer and Landowner classes shall be made so far as is possible according to this Court's directions in Paragraph M of these findings.

5. Distributions from the funds to members of the Lessee-Producer classes, shall be made subject to payment of 50% of such proceeds as royalty payments to members of the Landowner classes, in accordance with proportionate shares attributable to the individual mineral interests of each such landowner, as the case may be.

6. Determination of the right of each individual member of the Lessee-Producer and Landowner classes defined in each interpleader action, to share in final distribution of the funds, shall be determined in accordance with this Court's directions in Paragraph L of these findings.

7. All funds paid into the Court shall remain under supervision of the Court, and subject to further Order with reference to taxation of costs.

The Court directs that a proposed form of Judgment be prepared, circulated and submitted in accordance with the findings and conclusions of this Court. It is ordered that notice shall be given in the same manner as previously to absent members of each of the classes within sixty (60) days from this date, of the proposed judgment to be entered, and notice of the amounts for attorneys fees claimed against the fund by the respective parties, and that a final hearing be fixed, at which absent members of the classes may be afforded the right to present evidence or arguments on any issue determined herein. It is further ordered that at such final hearing, the class representatives may present such evidence as desired with reference to a determination to be made by the Court concerning taxation of costs and claims for attorneys' fees.

JUDGMENT ON REMAND

These six consolidated interpleader actions having come on regularly for trial upon remand from the decision of the United States Court of Appeals for the Tenth Circuit

(reported at 441 F.2d 704) and the evidence of the parties having been submitted herein, and the Court having made its Memorandum of Opinion, Findings of Fact and Conclusions of Law Upon Remand (which is incorporated herein by this reference thereto), it is ordered, adjudged and decreed as follows:

1. That the primary question to be determined in the present proceedings, as directed by the remand, is the reasonable value of the helium content of the helium-bearing natural gas at the time and at the point that such helium-bearing natural gas was delivered to Northern Natural Gas Company, Cities Service Gas Company, and to Panhandle Eastern Pipe Line Company and which helium content was subsequently extracted by the plaintiffs in interpleader and delivered to the United States under contracts between the United States and Northern Helex, Inc. (formerly Helex Inc.) dated August 15, 1961; between the United States and Cities Service Helex, Inc. executed August 22, 1961, and between the United States and National Helium Corporation dated October 13, 1961.

2. That the reasonable value of such helium content at the time and at the point it was delivered to the pipeline companies was as follows:

1961	60 cents per Mcf of helium
1962	61 cents per Mcf of helium
1963	62 cents per Mcf of helium
1964	63 cents per Mcf of helium
1965	64 cents per Mcf of helium
1966	65 cents per Mcf of helium
1967	66 cents per Mcf of helium
1968	67 cents per Mcf of helium
1969	68 cents per Mcf of helium
1970	69 cents per Mcf of helium
1971	70 cents per Mcf of helium
1972	70 cents per Mcf of helium

3. That the named "Lessee-Producer" defendants in KC-1969 are Ashland Oil & Refining Company, Cities Service Oil Company, Gulf Oil Corporation, Helmerich & Payne, Inc., Mapco Production Company (successor to Hugoton Plains Gas and Oil Company), Mobil Oil Corporation, Texaco, Inc., and Phillips Petroleum Company, appearing individually and as representative of a class of Lessee-Producer defendants described as:

> ". . . the persons, firms and corporations denominated 'lessee-producers' who are the owners of leasehold interests in the oil and gas leases from which gas is produced for delivery to Northern Natural Gas Company and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Northern Natural Gas Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader Northern Helex Company, into the possession of the United States of America at the delivery point described in that certain contract between the United States and Northern Helex Company (formerly Helex, Inc.) dated August 15, 1961."

4. That the named "Lessee-Producer" defendants in KC-1945, KC-1946, KC-1947, and KC-1948 are Mobil Oil Corporation, Ashland Oil & Refining Company, Cities Service Oil Company (formerly Columbian Fuel Corporation) and Amoco Production Company (formerly Pan American Petroleum Corporation), appearing individually and as representative of a class of Lessee-Producer defendants described as:

> ". . . the persons, firms and corporations denominated 'lessee-producers' who are the owners of leasehold interests in oil and gas leases productive of helium-bearing natural gas and who deliver, have delivered or will deliver helium contained in such gaseous

streams directly or indirectly to Cities Service Gas Company, which helium has been, is being, and will be removed and delivered by plaintiff in interpleader, Cities Service Helex, Inc., into the possession of the United States of America at the delivery point described in that certain contract between the United States of America and Cities Service Helex, Inc., dated August 22, 1961."

5. That the named "Lessee-Producer" defendants in KC-1980 are Ashland Oil & Refining Company, Cities Service Oil Company, Cabot Corporation, Cities Service Oil Company (formerly Columbian Fuel Corporation), Gulf Oil Corporation, Helmerich & Payne, Inc., Mobil Oil Corporation, Amoco Production Company (formerly Pan American Petroleum Corporation), Diamond Shamrock Corporation (successor to the Shamrock Oil and Gas Corporation), Texaco, Inc., Dorchester Gas Producing Company, and The Superior Oil Company, appearing individually and as representatives of a class of Lessee-Producer defendants described as:

". . . the persons, firms and corporations denominated 'lessee-producers,' who are the owners of leasehold interests in the oil and gas leases (from which gas is produced for delivery to Panhandle Eastern Pipe Line Company) and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Panhandle Eastern Pipe Line Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader National Helium Corporation into the possession of the United States of America at the delivery point described in that certain contract between the United States and National Helium Corporation dated October 13, 1961."

6. That the named "Landowner" defendants in KC-969 are Ralph Grounds, et al. and Oliver S. Brown, et al., being approximately 560 named individuals appearing individually and as representatives of a class of Landowner defendants described as:

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium is being or will be taken into the possession by the United States of America in Ellsworth County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Northern Helex Company (formerly Helex, Inc.) dated August 15, 1961."

7. That the named "Landowner" defendants in KC-1945 are O. W. Heger, et al. and Oliver S. Brown, et al., being approximately 700 named individuals; in KC-1946 are Vivian W. Scheutt, et al., J. W. Teater, Guy T. Miller, Marjorie S. Maser, Marion S. Pfeiffer, Federal Land Bank of Wichita, and Oliver S. Brown, et al., being approximately 210 named individuals; in KC-1947 are Katherine R. Adams, et al., and Oliver S. Brown, et al., being approximately 210 named individuals; and in KC-1948 are Bloyd Burgess, et al., and Oliver S. Brown, et al., being approximately 110 individuals appearing individually and as representatives of a class of Landowner defendants described as:

> ". . . the perso firms and corporations owning a mineral interest in and from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will

be taken into possession by the United States of America in Grant County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Cities Service Helex, Inc., dated August 22, 1961."

8. That the named "Landowner" defendants in KC-1980 are Ralph Grounds, et al., and Oliver S. Brown, et al., being approximately 550 named individuals, individually and as representatives of a class of Landowner defendants described as:

". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being, or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken into possession by the United States of America in Seward County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader National Helium Corporation, dated October 13, 1961."

9. That judgment is hereby entered against the respective plaintiff Helex Companies for, and requiring them to pay into the registry of the Court, in their respective interpleader cases, on an annual basis to the nearest accounting date to January 1, 1972, as shown in the evidence and in accordance with the Court's findings and conclusions, to the Lessee-Producers and the members of the respective classes which they represent, as their interests may appear, the reasonable value of the helium as described herein, together with interest thereon at the rate of six per cent (6%) per annum from the end of each year to the date of this judgment and at a rate of eight per cent (8%) thereafter on the total of said principal

amounts and said pre-judgment interest thereon, until such sums are paid into the registry of the Court.

10. That the plaintiff Helex Companies shall deposit in the registry of this Court the sums reflected to be due by such accountings. All funds paid into the Court shall remain under supervision of the Court, and subject to further Order with reference to the ultimate disposition thereof as herein provided.

11. That the Lessee-Producer defendants, including Panhandle Eastern Pipe Line Company, as a Lessee-Producer, shall account on such annual basis and in accordance with the Court's findings and conclusions to the Landowners and the members of the classes which they represent, as their interests may appear, for fifty per cent (50%) of the amounts accounted for by the Helex Companies to the Lessee-Producers in accordance herewith and the findings and conclusions, which accounting shall be subject to the approval of the Court after notice and hearing.

12. *The Court retains jurisdiction of the fund consisting of the "money paid and to be paid by the United States to the Helex Companies for the helium-gas mixture"* delivered to the United States under contracts between the United States and Cities Service Helex, Inc., dated August 22, 1961, and between the United States and National Helium Corporation dated October 13, 1961, pending all necessary further proceedings herein in connection with an accounting for the reasonable value of helium subsequent to the accounting period set forth in Paragraph 9 hereof and for the purpose of making distribution out of such fund in accordance with the Court's orders to be made pursuant to Paragraph 13 following.

13. The parties shall, at a time to be hereafter determined by the Court, after this Judgment is no longer

subject to appeal, file with the Clerk of this Court their respective claims for costs and litigation expenses, including attorney fees, which claims shall be allowed and paid in amounts found proper by the Court, according to guidelines provided in the prior order of this Court on 6/11/69 [Dkt. 1372] and after a hearing thereon, in the manner and upon such notice as the Court shall hereafter determine.

Payment thereof shall be made out of the fund consisting of "the money paid and to be paid by the United States to the interpleading plaintiffs for the helium-gas mixture produced and sold by them" to the United States under the contracts described in Paragraph 12 above, *over and above* that portion thereof to be accounted for pursuant to Paragraph 9 above.

14. That all claims, counter-claims, cross-claims, issues or contentions submitted by the respective parties and attached to the Pre-Trial Order filed January 9, 1974, and Appendices thereto, and not herein disposed of, are deemed to have been by the Court denied or overruled.

ORDER ON MOTIONS

Following entry of Judgment upon Remand [Dkt. 1738] and Order on Redetermination of Fees and Costs [Dkt. 1739] entered in the records of this Court on December 16, 1974, in these cases, numerous motions have been filed by the parties to alter and amend such judgment and order.

After review of these motions, and consideration of briefs filed in support of suggested alterations and amendments in the Court's orders, the following determinations are made.

A. *Motions to Strike References in Order Concerning Fees and Costs* [Dkt. 1750]

Motions have been filed by Landowners [Dkt. 1750], Mobil Oil Corporation and Mapco, Inc. [Dkt. 1752], Amoco Production Company [Dkt. 1755], and Diamond Shamrock Corporation [Dkt. 1756] to strike from the Court's order regarding a redetermination of fees and costs, those portions which make specific reference to "claims" made by the parties for attorneys' fees in connection with a hearing had on that issue in June, 1969. In particular, the parties object to the Court's references to rates of "$100 per day", or "$10 per hour."

In its most recent order concerning fees filed on December 16, 1974, the Court believes that it clearly stated that no determination or order would be made at this time concerning what would be a "reasonable fee," and the Court's order clearly contemplates that new applications for allowance of fees and costs will be filed after appellate review is concluded in these cases. The Court specifically noted that any tentative rulings concerning fees were not binding in any manner at this time.

For these reasons, the various motions to strike references in the order concerning redetermination of fees will be overruled.

B. *Motion of United States to Amend Judgment Filed December 16, 1974* [Dkt. 1954]

The United States objects to the Court's finding that the purpose of Case No. KC-1969, two payments made by the United States of $8,671,639.99 on January 14, 1971, and of $2,285,872.87, made on January 23, 1971, constitute payment for deliveries of crude helium, and as such, constitute a portion of the Fund which is the subject matter of Case No. KC-1969. It is suggested that the status of these payments should await final determination of the controversy

between Northern Helex Company and the United States, pending in the Court of Claims.

The Court determined as a matter of fact that, for the purposes of Case No. KC-1969, the two payments in question constituted a portion of the Fund in that case. The Court believes this finding to be correct and entirely appropriate at this point, inasmuch as it has assumed jurisdiction over the "Fund" which is the subject matter of KC-1969. If the United States believes this finding of fact to be in error, it may seek review of this Court's determination of this issue on appeal.

The Motion of the United States to amend the judgment will be overruled.

C. *Motion of Helex Companies to Alter or Amend Judgment on Remand* [Dkt. 1751]

The Helex companies contend that the Judgment prepared and entered by the Court on December 16, 1974 should be amended to: 1) "clarify the inconsistency between the Judgment on Remand and the Memorandum Opinion . . . . entered November 12, 1974" with reference to taxation of costs and notice to members of the Class; 2) by striking the allowance for prejudgment interest, upon the ground that under Kansas law there can be no compounding of interest; and 3) by adding to the Judgment on Remand the express language contained in Rule 54(b) "That there is no just reason for delay and it is expressly directed that this Judgment on Remand be entered."

When the Court prepared its Memorandum, Findings of Fact, and Conclusions of Law, it was contemplated that the parties would be able to prepare and submit a proposed Judgment in accordance with those findings. Some controversy arose as to whether or not it was even necessary to file a formal Judgment, inasmuch as the Court of

Appeals, in remanding the case, had retained jurisdiction of the matter. In order to expedite an orderly appeal from this Court's findings, the Court thereafter determined that it should prepare and file a formal Judgment. With the additional order filed the same date as the Judgment, concerning a determination of costs and fees, the Court believes that the appellate tribunal will now have before it for review all relevant issues, save those dealing with the ultimate accounting, assessment of costs and fees, and final distribution of the Fund. Prior to that the Court contemplates that proper notices will issue to all absent members of the various classes.

The Court believes its views regarding the award of pre-judgment interest are adequately set out in the Memorandum and Judgment, and the Helex companies will have ample opportunity to have these determinations reviewed by the appellate court.

The Court likewise declines to amend its Judgment for the purpose of directing that the Judgment on Remand "be entered". It has been filed and entered in the Records of this Court.

For the foregoing reasons,

It is ordered that the Motions of Landowners, Mobil Oil Corporation, Mapco, Inc., Amoco Production Company, and Diamond Shamrock Corporation [Dkts. 1750, 1752, 1755, 1756] to Strike References in Order Concerning Fees and Costs heretofore entered on December 16, 1974, be, and they are hereby overruled;

It is ordered, that the Motion of the United States to Amend Judgment on Remand [Dkt. 1754] be and it is hereby overruled; and

It is further ordered that the Motion of the Helex companies to Alter or Amend the Judgment on Remand [Dkt. 1751] be, and it is hereby overruled.

APPENDIX C

Opinion of the United States Court of Appeals for the Tenth Circuit. Dated March 2, 1971 (441 F.2d 704)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

307-69, 308-69, 309-69, 310-69,
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512-69, 513-69, 514-69, 515-69.

JANUARY TERM, 1971

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al. (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

Appeals from the United States District Court for the District of Kansas

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The above caption was adopted in a court-approved stipulation. These 88 appeals are from a judgment entered in eight consolidated civil actions, all filed in, or transferred to, the United States District Court for the District of Kansas. In one aspect or another, each is a class action. For convenience, the parties are divided into four groups, (1) the landowners, (2) the lessee-producers, (3) the Helex group, and (4) the United States.

Wayne Coulson and Dale M. Stuckey argued the cause for the landowners. With them on the brief were Bernard E. Nordling, Leland E. Nordling, Gene Stipe, Richard L. Gossett, Leo Winters, and W. A. McWilliams, attorneys for landowners; Donald I. Mitchell, attorney for Federal Land Bank; and of counsel were Kramer, Nordling & Nordling, Fleeson, Gooing, Coulson & Kitch, and Stipe, Gossett & Stipe.

Richard Jones, James B. Diggs, Gerald Sawatzky, and George C. Spradling argued the cause for the lessee-pro-

ducers. With them on the brief were Arloe W. Mayne, G. Fred Charles, J. M. O'Loughlin, and Stanley G. Andeel, attorneys for Ashland Oil & Refining Company; William C. Charlton and Stanley G. Andeel, attorneys for Cabot Corporation; Cecil C. Cammack, Alfred O. Holl, Roy Z. Johnson, R. O. Mason, and Stanford J. Smith, attorneys for Cities Service Oil Company; Stanley G. Andeel, attorney for Dorchester Gas Producing Company; Wm. F. Pielsticker, attorney for Gulf Oil Corporation; William R. Horkey, Leon C. Gavras, and Stanley G. Andeel, attorneys for Helmerich & Payne, Inc.; Charles B. Wallace, Donald G. Canuteson, and William H. Tabb, attorneys for Mobil Oil Corporation; H. O. Hickman and R. H. Landt, attorneys for Pan American Petroleum Corporation; H. A. Berry, W. M. Sutton, W. E. Notestine and George B. Collins, attorneys for Diamond Shamrock Corporation; Murray Christian and R. T. Robberson, attorneys for The Superior Oil Company; Eugene G. Bell, attorney for Mapco Production Company; Philip R. Wimbish, Elmer W. Adams, and Stanley G. Andeel, attorneys for Texaco, Inc.; and of counsel were Foulston, Siefkin, Powers & Eberhardt, attorneys for Ashland Oil & Refining Company, Cabot Corporation, Dorchester Gas Producing Company, Helmerich & Payne, Inc., and Texaco, Inc., Hershberger, Patterson, Jones & Thompson, attorneys for Mapco Production Company, Mobil Oil Corporation, and The Superior Oil Company, Holliman, Mason & Maddux, attorneys for Cities Service Oil Company, Lilleston, Spradling, Gott, Stallwitz & Hope, attorneys for Pan American Petroleum Corporation, and Underwood, Wilson, Sutton, Heare & Berry, attorneys for The Diamond-Shamrock Corporation.

Emmet A. Blaes, Richard B. McDermott, William S. Richardson, and Mark H. Adams II argued the cause for the Helex group. With them on the brief were Jack W. Wertz, George E. Peabody, and Mark H. Adams of Adams, Jones, Robinson and Manka, attorneys for Cities Service Gas Company; Mark H. Adams of Adams, Jones, Robinson

and Manka, attorneys for Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.; Wm. J. Zeman, Lloyd G. Minter, Kenneth Heady, and Boesche, McDermott and Eskridge, attorneys for Phillips Petroleum Company; Jochems, Sargent and Blues, Wendell J. Doggett, and William L. Robertson, attorneys for National Helium Corporation and Panhandle Eastern Pipe Line Company; F. Vinson Roach, Patrick J. McCarthy, and Mark H. Adams of Adams, Jones, Robinson and Manka, attorneys for Northern Natural Gas Company, Northern Helex Company, and Northern Gas Products Company.

Floyd L. France argued the cause for the United States. With him on the brief were Shiro Kashiwa, Assistant Attorney General, Bernard V. Borst, Assistant United States Attorney, and S. Billingsley Hill, Attorney, Department of Justice.

Before BREITENSTEIN, SETH and MCWILLIAMS, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Helium, a rare element found as a component of natural gas, has become in the last 20 years increasingly important to national defense, science and industry. Through scientific and technical advances this inert and noncombustible gas, which was formerly wasted at the burner tips of gas appliances, now has great value. Congress recognized the need for helium by the Helium Act Amendments of 1960, Pub. L. 86-777, 74 Stat. 918, 50 U.S.C. § 167 et seq., which provide for a helium conservation program, with private participation, under the control of the Bureau of Mines, an agency of the Department of the Interior.

The natural gas fields of the Hugoton area in Western Kansas and the Oklahoma and Texas panhandles contain

99% of the nation's recoverable supply of helium. The landowners gave the leases under which the helium-bearing gas is obtained from the earth. The lessee-producers drilled the wells, produced the gas, and sold it to interstate pipelines which are under the jurisdiction of the Federal Power Commission. Affiliates and subsidiaries of the pipelines, the Helex group, separate helium from other gaseous components and sell the mixture to the United States. The Bureau of Mines stores the helium mixture and refines it to 99.99% pure helium for sale to government agencies and private industry. The basic issue is whether the landowners and the lessee-producers can receive benefit from the value of the helium. The trial court rejected all claims of the landowners and lessee-producers to the helium and gave judgment for the Helex group and the United States. See Northern Natural Gas Company v. Grounds, D.Kan., 292 F.Supp. 619. We reverse. In our opinion the Helex companies must account to the lessee-producers for the reasonable value of the helium contained in the processed gas and the lessee-producers must pay royalty on such value to the landowners.

Six of the eight actions which were consolidated for trial are in the nature of interpleader. The fund in each suit is the money paid and to be paid by the United States to the interpleading plaintiffs for the helium-gas mixture produced and sold by them. Four of the cases were brought by Cities Service Gas Company, a pipeline. One was brought by Northern Natural Gas Company, a pipeline, and its subsidiary Northern Helex Company. In each of these five cases the defendants are named landowners and named lessee-producers in each instance as representatives of a class. The sixth interpleader was brought by National Helium Corporation which is owned in equal shares by Panhandle Eastern Pipe Line Company and National Chemical and Distillers Company. The defendants are Panhandle Eastern and named landowners as representatives of a class. Pursuant to a third-party complaint by

Panhandle Eastern, named lessee-producers were brought in as representatives of a class. Motions to dismiss the interpleaders on jurisdictional grounds were denied by the trial court and we affirmed. Grounds v. Northern Natural Gas Company, 10 Cir., 327 F.2d 1003.

The remaining two actions were brought by named landowners, as representatives of their class, against the United States. One is under the Federal Tort Claims Act, see 28 U.S.C. §§ 1346(b), 1402, and 2674, on the theory of conversion, and the other under the Tucker Act, see 28 U.S.C. § 1346(a)(2), on the theory of reverse condemnation.

All eight actions were maintained in the district court as class actions under Rule 23, F.R.Civ.P. One class is the landowners and the other is the lessee-producers. The district court held that the actions were properly maintainable as class actions. See 292 F.Supp. 619, 633-637. On these appeals no question is raised as to the propriety of the district court treatment of the cases as class actions.

After consolidation, there were extensive discovery proceedings, a definitive pre-trial order, and a 43-day trial limited to the question of liability. The trial court made full and detailed findings of fact which are found at 292 F.Supp. 619. For the sake of brevity in this opinion, we repeat only those facts which we deem necessary for understanding of the case and disposition of the issues. It is enough to say that we find no material dispute as to the determinative facts. The controversy is over the conclusions to be drawn from those facts and the application of the law thereto.

Helium is a colorless, odorless, and tasteless gas which, in the present state of scientific knowledge, will not react chemically or physically with any other element, except under laboratory conditions. The generally accepted theory is that helium is formed by radioactive disintegration within the earth and migrates to the same reservoir traps as do other gases. Through eons of time it has commingled with,

and become diffused with, natural gas hydrocarbons which were formed from organic materials of ages past. Helium is noncombustible. It is the second lightest element found on earth, next to hydrogen which is highly combustible. Helium does not liquefy at standard atmospheric pressure until it reaches –452.1 degrees Fahrenheit, almost absolute zero and lower than any other gas.

Helium was first discovered in the spectrum of sunlight in 1868. Sometime in the 1890's helium was found on the earth. In 1905, helium was discovered in gas from a well at Dexter, Kansas. Helium remained a laboratory curiosity until 1918 when the United States began commercial extraction of helium from gas produced in the Petrolia Field of Texas for use in military balloons and blimps during World War I.[1]

Before 1960, with minor exceptions, the production and marketing of helium was accomplished by the Bureau of Mines pursuant to the Helium Act of 1925, 43 Stat. 1110. Until the advent of World War II, the uses of helium outside of the laboratory were in lighter-than-air craft and, when mixed with oxygen, in medicine and deep-sea diving. During this period, the United States by purchase and condemnation obtained various rights under which it produced helium at government plants. The 1937 amendments, 50 Stat. 885, to the Helium Act of 1925, directed the Secretary of the Interior to purchase if possible all private helium plants. Under this authority the United States acquired two plants of the Girdler Corporation, the only private helium extraction operation in the country at that time.

During World War II the government constructed four plants to meet the greatly increased military need for helium. After the war all of the plants except one were shut

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[1] For the history of helium and the programs of the United States for its conservation see Clifford W. Seibel's book "Helium—Child of the Sun" 1968, University of Kansas Press.

down. In the 1950's the demand for helium rose spectacularly. This came from a combination of new uses, including atomic weapons, nuclear energy plants, military and civilian rocketry, exploration of outer space, the field of cryogenics, welding of newly used metals, breathing mixtures for medical patients, divers and astronauts, and other uses connected with both science and industry. Because of the limited supply and the wasting of the known reserves, the government set up a Helium Policy Working Group under the chairmanship of Under Secretary of the Interior Chilson. The group recommended a program which envisaged participation by private industry. The 1960 amendments to the Helium Act were the result of these activities.

The record shows that, although helium is contained in either measurable or detectable quantities in gas found in a majority of natural gas fields in the United States, 99% of the nation's helium resources are in the natural gas reserves of the Hugoton area. 292 F.Supp. at 654. This area is approximately 210 miles from north to south, and 160 miles from east to west. It covers approximately 33,000 square miles and over 21 million acres. Underlying the area are about 15% of the known natural gas reserves of the United States. According to some of the testimony, it is the largest single, pressure-connected gas reservoir in the world. The helium content averages between .4% and .5% in volume. The economically recoverable helium is estimated at 119 billion cubic feet from estimated resources of a total of 36.4 trillion cubic feet of gas.

The components of natural gas produced in the Hugoton area are about 85% hydrocarbons ranging from methane, the compound lightest in molecular weight but lowest in Btu (British Thermal Unit, a measure of heat) yield per unit of volume, through ethane and propane up to various heavier hydrocarbons. The remaining 15% is composed of non-hydrocarbon constituents including nitrogen, oxygen, argon, helium, hydrogen sulfide, hydrogen, and carbon dioxide. The composition of gas from separate wells is not

constant. For example, methane runs from a low of 45.9% to a high of 82.6%, nitrogen from 6.5% to 44.3%, and helium from .22% to .97%.

The production of natural gas from underground reservoirs is accomplished by reservoir pressure, specifically the difference between the greater reservoir and lesser wellhead pressure causes the gas to flow through the well bore. The output of gas is produced in its entirety with all of its constitutents randomly commingled. The separation of helium at the wellhead is not economically feasible.

The first gas well in the Hugoton area was completed in Texas in 1918 and was followed by Kansas and Oklahoma wells in 1922. Development of the fields in terms of completed wells was slow until the late 1920's and early 1930's when the extension of pipelines into the area made it accessible to commercial markets. The productive geographical limits expanded gradually and were finally defined in the 1940's. The record shows that prior to 1954 there were 8,504 wells drilled in the area and an additional 1,538 wells in the period 1954-1959.

The gas is produced under leases given by the owners of the appropriate mineral rights. The trial court said that 65% of the leases were taken by lease brokers rather than by representatives of the producing industry. There are thousands of leases and a great variety of lease forms. The leases were either assigned to, or taken by, the companies within the lessee-producer group for development, production, and marketing. The lessee-producers sell the gas to pipeline companies which transport it interstate for resale. The gas is commonly delivered at the wellhead but occasionally at a gathering point and the volume is measured when delivered. The price is stated in terms of cents per Mcf, thousand cubic feet, and is commonly subject to quality adjustments depending on Btu content. Ordinarily, the sales by the lessee-producers are under long-term executory contracts containing price escalation, arbitration, or renegotiation clauses.

The question of title to helium arose during the contract negotiations between the Helex companies and the Bureau of Mines.[2] The Helex companies agreed to warrant title and to indemnify the United States for all ownership claims of third parties. The ultimate cost each seller might have to bear because of title failure is limited by various contract provisions which were thus summarized by the trial court, 292 F. Supp. at 658:

> "The ultimate cost each seller [Helex company] might have to bear as a result of failure of title is limited, however, by provisions that the seller be reimbursed by the United States for all payments made in satisfaction or settlement of ownership claims to helium, to the extent that such payments exceed approximately $3.00 per Mcf of helium."

With this background we turn to the contentions of the parties. Other pertinent facts will be developed in the discussion of specific issues.

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[2] A March 5, 1962, memo by the U. S. General Accounting Office regarding negotiation of helium contracts contains this statement: "Mr. Wheeler [Assistant Director, Helium, Bureau of Mines] advised that in cost negotiations, the contractors were allowed, as part of the unit price, a helium payment of about $2.00 a thousand cubic feet (MCF) of helium delivered because the natural gas companies believed that they could not warrant clear and unrestricted title to the helium. The companies contended that the gas rights owned permitted them to sell natural gas and not helium. Therefore, in order to provide for possible future payments to lessees, the companies insisted upon a helium payment of $2.00 a MCF for helium delivered. Although there has not been any known court cases on this subject, Mr. Wheeler stated that, in essence, this payment provides for a *contingency* in the event that (1) the companies are sued by lessees, (2) the court renders a decision that the companies do not have clear title to the helium contained in natural gas and (3) the companies are liable to pay third parties for the helium extracted from natural gas. (Over the life of the four negotiated contracts, this helium payment will amount to an estimated $125 million.)"

1. Landowners' Claims.

The landowners contend that the leases cover only combustible oil and gas. The trial court held that the grant of gas in each lease "extends to the entire gas stream which emerges at the wellhead absent an express reservation of any constituent products, and that helium passes thereunder unless expressly reserved."

There are estimated to be approximately 30,000 persons who receive income from the production of helium-bearing natural gas by virtue of ownership of land, mineral interest, royalty, or other interests. Thousands of leases executed on more than 150 printed forms cover the Hugoton gas. Over 75% of the leases were executed after 1940. Leases held by named lessee-producers have at least 50 different granting clauses. Six of these clauses are found in leases covering over 90% of the acreage. These were summarized thus by the trial court, 292 F. Supp. at 660:

Kansas and Oklahoma Leases

	Percentage of Acreage
"oil and gas, casinghead gas and casinghead gasoline"	69.688
"oil, gas, casinghead gas, casinghead gasoline and all other gases and their respective constituent vapors"	10.132
"oil and gas"	7.144
"oil, distillate, gas, casinghead gas, casinghead gasoline and all other gases and their respective constituent vapors"	3.311
	90.275

Texas Leases

"oil and gas"	39.860
"oil, gas and all other minerals"	25.517
"oil and gas, casinghead gas and casinghead gasoline"	14.545
"oil, gas, and all other minerals"	14.168
	94.090

Leases covering 99.99% of the acreage contain the words "oil" and "gas." Of the many different granting clauses the landowners regard only five as conveying helium as part of the gas. In these instances the language specifically covers all gaseous substances without regard to their similarity or dissimilarity to "gas" as used in the phrase "oil and gas." The most commonly used lease form grants "oil and gas, casinghead gas and casinghead gasoline."[8]

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[8] The pertinent provisions of this form are:

"1. That lessor, for and in consideration of the sum of One and No/100 - - Dollars ($1.00), in hand paid, and of the covenants and agreements hereinafter contained to be performed by the lessee, has this day granted and leased and hereby grants, leases and lets unto the lessee for the purpose of mining and operating for and producing oil and gas, casinghead gas and casinghead gasoline, laying pipe lines, building tanks, storing oil, building power stations, telephone lines and other structures thereon to produce, save, take care of and manufacture all of such substances, and for housing and boarding employees, the following described tract of land • • •.

"2. This lease shall remain in force for a term ending October 23, 1951, and as long thereafter as oil, gas, casinghead gas, casinghead gasoline, or any of them is produced.

• • • • •

"4. Lessee shall pay lessor monthly as royalty: (a) on gas marketed from each well, one-eigth (⅛) of the proceeds if sold at the well, or, if marketed by lessee off the leased premises, then one-eighth (⅛) of the market value thereof at the well; (b) on gas used by lessee for the extraction of casinghead gasoline, one-eighth (⅛) of the value of the natural gasoline content as determined by the Natural Gasoline Association of America revised contract, adopted April 4, 1939; • • •. Lessor shall have the privilege at his own risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling located on the leased premises by making his own connections thereto.

• • • • •

"8. The lessee shall have the right to use free of cost, gas, oil and water found on said land for its operations thereon, except water from wells of the lessor. • • •"

By statute in each of the three states a conveyance of real estate passes the entire estate of the grantor unless an intent to pass a lesser estate expressly appears or is necessarily implied. K.S.A. § 58-2202, 16 O.S.A. § 29; Vernon's Ann. Rev. Civ. Stat of the State of Texas, art. 1291. In Kansas and Oklahoma an oil and gas lease is a license, incorporeal hereditament, or profit a prendre. See Summers, The Law of Oil and Gas §§ 161, 164 (1954) and the cases there cited. In Texas an oil and gas lease conveys a fee simple determinable and is a "present conveyance of * * * the entire title to the designated minerals existing in the land." Andrews v. Brown, Tex. Civ. App., 283 S.W. 288, 291. For our purposes we see no difference in result whether the leases are considered as licenses or conveyances.

Our first problem is with the word gas. The trial court said that " 'gas' or 'gases' are used interchangeably to describe any naturally-formed aeriform substances indigenous to the underlying reservoir, which aeriform substances include helium. * * * " See 292 F. Supp. at 686. The learned dissertations of the parties on the derivation and use of the word gas during the last several hundred years is interesting but not conclusive. Gas is a generic term which is defined in Webster's Third New International Dictionary (G. & C. Merriam Co., 1961) as

> "1. A fluid (as air) that has neither independent shape nor volume but tends to expand indefinitely; a substance at a temperature above its critical temperature and therefore not liquefiable by pressure alone. * * *"

As we see the problem, gas has two meanings, one in the physicist's sense conforming to the Webster definition and the other in the vernacular sense with the meaning dependent on the use of the word. The landowners point out that in the leases the word oil and the word gas are used in conjunction. They contend that the terms "oil"

and "gas" taken together are used interchangeably with the term "petroleum." Accordingly, they say, gas must refer to a gaseous hydrocarbon. This is a non sequitur. It is an attempt either to rewrite the leases or to convert a claimed vernacular use into a subjective intent. Nothing in the record shows that "oil and gas" or "petroleum" come from the earth as a pure hydrocarbon. The record does show that Hugoton gas contains noncombustible components. We doubt whether it is possible to produce either oil or gas without at the same time producing some impurities.

The landowners' attempt to bolster their position by reliance on ejusdem generis is not persuasive. Ejusdem generis is a tool to be used in search for the correct meaning of words. Ordinarily it limits general terms which follow specific ones to matters similar to those specified. Gooch v. United States, 297 U.S. 124, 128. The landowners say that the word oil is specific and limits the meaning of gas. We believe that the word oil and the word gas have equal status. Navajo Tribe of Indians v. United States, Ct. Cl., 364 F. 2d 320, 325, 327, to which reference will be made later, rejected the application of ejusdem generis in the construction of a lease of "all the oil and gas deposits." We agree.

The landowners say that the word gas is ambiguous. The argument seems to run like this. Gas has a physicist's meaning to describe a state of matter and a popular, or industry meaning, to cover a mixture of gaseous hydrocarbons. This brings us to the field of semantics. We agree that the meaning of a statement often requires a knowledge of its connotation and that the objective meaning of a word cannot be considered, ordinarily, separate and apart from the context of its actual subjective use. The argument goes that the landowners subjectively intended to grant combustible oil and gas and nothing else. All this does is to lead us to the question of intent which we shall discuss later. In our opinion there is no ambigu-

ity which calls into play the rule that oil and gas leases, when ambiguous, are construed against the lessees and in favor of the lessors. See e.g. Beatty v. Baxter, 208 Okl. 686, 258 P. 2d 626.

Few decisions have any bearing on the specific issue. In Gilmore v. Superior Oil Co., 192 Kan. 388, 388 P. 2d 602, the court was concerned with the deduction of compression expenses from gas royalties. In holding that a lessee could not withhold royalties in order to charge lessors with compression costs, the court commented that if a lessee desires complete coverage "of oil, gas, liquid hydrocarbons, or even helium gas * * * the lessee has the opportunity to protect itself by the manner in which it draws the lease." Ibid at 605. Relying on Curtis Publishing Co. v. Cassel, 10 Cir., 302 F. 2d 132, 135, and like cases, the landowners say that this is a clear and unequivocal statement that an oil and gas lease not mentioning helium does not cover it and, so far as Kansas is concerned, is binding on federal courts. We are not convinced. Gilmore was concerned with duty to market, not with lease coverage. The statement is not considered dictum but is "comment merely obiter," see Hawks v. Hamill, 288 U.S. 52, 59, and is neither conclusive nor particularly persuasive.

The landowners emphasize the Oklahoma casinghead gas cases. Casinghead gas is nothing more than gas from an oil well. Mussellem v. Magnolia Petroleum Co., 107 Okl. 183, 231 Pac. 526, 530. The evidence shows that casinghead gas is composed of the lighter members of the paraffin series, largely methane with some ethane and propane. Casinghead gasoline is composed of heavier elements of the same series.

Hammett Oil Co. v. Gypsy Oil Co., 95 Okl. 235, 218 P. 501, held that a contract for royalty on oil did not entitle the holder to royalty on gasoline manufactured from casinghead gas. Hammett and the cases which followed it are summarized in Broswood Oil Co. v. Sand Springs Home, 178 Okl. 550, 62 P. 2d 1004, 1006, which states the

effect of the Oklahoma rule to be that, absent a contrary intent of the parties, a reservation of royalty on oil and on gas "means oil in its ordinary acceptation and gas from a gas well as the same is ordinarily understood. * * *" The rule established in Hammett and its progeny has been subject to considerable criticism. Ibid. There appears to be some uncertainty in the Oklahoma cases concerned with the problem of whether casinghead gas is within a lease which covers both oil and gas.

For whatever the Oklahoma casinghead gas decisions may be worth and regardless of whether they are sound law, we believe that they are not applicable here. When the lease, or other agreement, provides for royalty on oil from an oil well and on gas from a gas well and casinghead gas is produced from an oil well, the recovery of royalty depends on whether gas emerging from an oil well is commonly understood to be oil. In the Hugoton area, helium emerges as a component of the gas produced from a gas well. It necessarily comes from the wellhead and into the transmission line with all the gases which make up the entire stream. Casinghead gas from an oil well is only incidental to the production of oil and may be separated at the wellhead.

The situation in Texas is different. Lone Star Gas Co. v. Stine, Tex. Com. App., 41 S.W. 2d 48, was concerned with a deed covering "all natural gas." The question was whether natural gasoline was covered by the grant. The court held that it was and said that natural gas meant all the constituent elements composing the gas and that the grantee had the right to sell the gas in the form in which it emerged from the earth or to split it into its constituent elements and sell them. Taking literally, this language is broad enough to embrace helium in a grant of gas. The reasoning of the court, however, will not apply to helium. The court compared oil, gas, casinghead gas, and coal, and drew the premise that but for their distinction in natural form, these substances possess

somewhat similar chemical properties and are readily convertible into gaseous hydrocarbons by artificial means. Helium is not a hydrocarbon and is not convertible into one.

The decision closest to our problem is Navajo Tribe of Indians v. United States, Ct. Cl., 364 F. 2d 320, 324-327. The Tribe claimed that a 1923 lease "of all the oil and gas deposits" referred to gaseous hydrocarbons and not to helium. In the 1940's helium-bearing gas was produced and the Tribe was paid royalties. The Court of Claims found the Oklahoma casinghead gas cases unpersuasive and followed Lone Star. It said that although the parties may have been thinking of fuel-type gases, it was more realistic to presume that "the grant included not only hydrocarbons but the other gaseous elements as well." Our principal difficulty with Navajo is that it treats the problem of whether the word gas includes helium as one of law. This may have been proper when dealing with tribal lands without regard to any state law impediment. We believe that this question is one of fact and of the conclusions which are to be drawn from the facts.

The only other helium case is Hoff v. Girdler Corp., 104 Colo. 56, 88 P. 2d 100. We fail to see the relevance of that decision. The issue was whether the lessee had abandoned the lease. The question whether a grant of gas included helium was not raised.

In Hans v. Great Bend Brick & Tile Co., 172 Kan. 478, 241 P. 2d 475, 478, the court said that a conveyance of all the "oil, gas and other minerals" did not include clay. Oklahoma has held that a reservation of "oil, petroleum, gas, coal, asphalt and all the other minerals of every kind and character" was not a reservation of underground water. See Mack Oil Co. v. Laurence, Okl., 389 P. 2d 955, 961. A similar result was reached in Texas by Fleming Foundation v. Texaco, Inc., Tex. Civ. App., 337 S.W. 2d 846, 852, which held that subsurface water was not within a grant of oil, gas and other minerals.

We believe that it is a fair interpretation of the cases just cited to say that in the three states intent is a question of fact. A plethora of evidence was received on the point. The landowners rely on the meaning of gas in both common and industrial usage. They presented a lexicographer who made a study of dictionaries, encyclopedias, area newspapers and selected magazine articles and stated his opinion that the word gas did not connote helium to the average landowner of the Hugoton area. Their opponents counter with an account of the helium development in the period from 1917 to World War II and emphasize that in federal oil and gas leases made after 1920 the United States expressly reserved helium. A recitation of all of the evidence would serve no good purpose. The trial court found that gas did not connote helium to the average landowner, that no landowner specifically contemplated helium in granting rights to produce gas, and that other evidence establishes "that he had no intention whatever respecting it." 292 F. Supp. at 664. Such findings are supported by substantial evidence and we must accept them.

The landowners say further that the value of natural gas lies in its use as fuel, that helium is valueless as a part of a fuel stream, and that the average landowner could not have intended to convey helium for fuel purposes. The Helex companies, although conceding that the principal use of natural gas has been for fuel, point out that it has other uses of economic value such as a feed stock for petrochemical operations, the manufacture of carbon black, and as a pressuring agent in oil production. Six witnesses who had either taken leases or supervised such activities testified that to their knowledge no land man or lease negotiator had ever discussed the gas to be leased in terms of its constituents. The only lease making specific provision for helium was executed after the start of this litigation. The trial court said that this phase of the argument "is but an attempt to convert an uninformed popular notion respect-

ing the commercial uses of natural gas into an intention by the lessor to convey only those discrete constituents of the gas stream, the uses of which conformed to that notion." 292 F. Supp. at 665.

The trial court concluded its treatment of this part of the case by saying that, in view of the circumstances of lease execution, the definition and usage of terms within the industry, and the intentions of the parties as disclosed by their actions, the leases extend to the entire gas stream absent an express reservation, and helium passes thereunder unless expressly reserved. 292 F. Supp. at 669. The landowners contend that this conclusion is inconsistent with the finding that the average landowner had no intent with regard to helium.

We believe that the issue is whether general or specific intent controls. The claimed general intent is lease coverage of all components of the gas produced by the wells. The specific intent is said to be lease coverage only of combustible gas. General intent includes helium and specific intent excludes it.

Nothing in the leases shows an intent to convey only combustible gas. If that is what the lessors meant, they should have said so. The evidence of the landowners is that they knew nothing of helium. If that is true, they could not have had any intent with regard to it. Reliance on specific intent is not compatible with denial of any intent. We believe that the search should be for general intent rather than for a supposed, but unexpressed, specific intent. General intent should be discovered not by defining and redefining the terms used but by considering the purposes of the grant in terms of enjoyment of the rights created. See Comment. New Values Under Old Oil and Gas Leases: Helium Who Owns It? 62 Mich. L. Rev. 1158, 1169.

The landowners desired to profit by the production of gas from their lands. To attain this end they gave exclu-

sive leases permitting exploration, development, production and marketing. The lessees drilled the wells and found gas. The gas came from the ground with all of its components and was measured at the wellhead. The gas was produced as a whole without separation of any of the components. Wellhead separation of helium was impractical.

In Utilities Production Corporation v. Carter Oil Co., 10 Cir., 72 F. 2d 655, 659, a case concerning the right of an oil lessee to use residue gas for repressurization, we said that the argument that lease parties contemplated the use of gas "for such methods of operation and development as were known to the industry the day the leases were signed * * *" was specious, and that a "foresighted intent cannot be imputed to the parties, for they knew that improvements would come about during the terms of the leases, and must have contemplated the use of such improved methods." We believe that those principles apply here. It is true that we are dealing with a new use of a component of the gas rather than an improved method of production but we are aware of no reason why the result should be different.

In the final analysis, the effort of the landowners is to write into the leases an exception or reservation which is not found in the executed instruments. They seek to except from the leases the helium which they cannot produce themselves. The only way to obtain value for the helium is to produce it, together with all other components of the gas, and run the gas through a separator. We will not import into the grants of oil and gas a subjective intent to convey only those components of the gas which comport to a subjective notion of the commercial end uses at the time of lease execution.

In our opinion general intent is closer to original intent than is specific intent which blossoms when a component previously regarded as an impurity becomes valuable. The discovery of the use and value of a component does not

expand the grant but the expansion of that discovery into tangible value makes more certain the specific object of the general grant. We conclude that, absent specific reservations, the grant of gas by the leases covered all components of the gas, including helium.

In the interpleader actions the landowners have asserted alternative in personam cross-claims against the producers based on abandonment and an alleged breach of the covenant to market. The lessee-producers say that the court does not have jurisdiction of such claims, that abandonment is not present because neither intentional nor voluntary relinquishment of the leases has been shown, and that no breach of the covenant has occurred because after the market developed in 1962 they diligently pursued their rights to payment for the helium content. Interpleader jurisdiction is limited to the fund in controversy. Here the fund is the money paid and to be paid to the interpleading plaintiffs for the helium-gas mixture produced and sold by them. The cross-claims have no relation to that fund. Hence, jurisdiction is not established. See State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533-537, and Knoll v. Socony Mobil Oil Co., 10 Cir., 369 F. 2d 425, 429, cert. denied 386 U.S. 977.

The Tort Claims case, based on conversion, and the Tucker Act case, based on reverse condemnation, are each dependent on the theory that the landowners have not parted with title to the helium. Our holding that the leases grant the helium removes the essential basis for each case and requires affirmance of the district court's dismissal of each.

2. Lessee-Producers' Claims.

The lessee-producers have drilled the wells, produced the gas, and sold it to interstate pipelines whose Helex subsidiaries separate helium from many other components and deliver the resulting mixture to the Bureau of Mines for further refinement. The named lessee-producers rep-

resent a class of well over 500 oil and gas operators. The lessee-producers say that they are entitled to recover out of the interpleaded funds the reasonable value of the commingled helium. They concede that they must pay royalty to the landowners on any amounts so received. The trial court held that the Helex companies have no liability to the lessee-producers.

The parties stipulated that helium-bearing natural gas delivered to the Helex companies is gas purchased and transmitted for resale in interstate commerce, that all gas purchase contracts between the lessee-producers and the pipelines are filed with the Federal Power Commission (FPC) as rate schedules under the Natural Gas Act, and that all payments made by the pipelines to the lessee-producers are at rates established, or permitted to be paid, by FPC.

The Natural Gas Act of 1938, 52 Stat. 821-833, 15 U.S.C. §§ 717-717w, placed the pipelines under FPC jurisdiction. In 1954 by its decision in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, the Supreme Court held that independent producers[4] are natural gas companies within the meaning of the Natural Gas Act and subject to FPC jurisdiction. The lessee-producers are independent producers.

The Natural Gas Act provides that all rates and charges of natural gas companies "shall be just and reasonable." See 15 U.S.C. § 717c(a). After the Phillips decision, FPC required independent producers to file their contracts with the pipelines and the contract price was accepted subject to FPC review.

FPC regulation of the pipelines has been on a conventional, cost-of-service, public utility basis which was found

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[4] FPC regulations, 18 CFR § 154.91(a) (1969), define independent producer as "any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce."

undesirable in application to the independent producers. In its CATCO decision, Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, the Supreme Court directed the FPC, in protection of the public interest, to hold the line on rate increases. Responsive thereto, the FPC established in-line rates on an area basis. These rates are specified in FPC Statement of General Policy No. 61-1, issued September 28, 1960. See 18 CFR § 2.56 and amendments thereto. The effect thereof is that FPC will not certificate initial rates, and will suspend increased rates, which exceed the prescribed levels. The service rates fixed for Hugoton were 11¢ per Mcf. FPC area rate making was upheld by the Supreme Court in Permian Basin Area Rate Cases, 390 U.S. 747. The record shows that in Area Rate Proceeding, et al. (Hugoton-Anadarko Area), Docket No. AR 64-1, the presiding examiner's decision, which we are told at argument has been approved by the FPC so far as pertinent here, fixed the service rates for wellhead deliveries in the Hugoton area at 12.1¢ in the Texas panhandle, 11.9¢ in the Oklahoma panhandle, and 11.3¢ in Kansas. The Helex group and the United States say in effect that these service rates fix the prices which the lessee-producers can receive from the pipelines for Hugoton gas, including its helium content.

The 1960 Helium Act Amendments authorized the Secretary of the Interior to make long-term contracts, not exceeding twenty-five years, for the acquisition, processing, transportation, and conservation of helium. The Bureau of Mines negotiated with pipelines controlling large volumes of helium-bearing gas. In 1961, contracts were made with Northern, Cities Service, and National, all of which are interpleader plaintiffs. Another contract later that year was made with Phillips Petroleum Company which is not an interpleader plaintiff but which was joined by the government as a third-party defendant in the landowners' Tort Claims and Tucker Act suits. Phillips was also brought in as a lessee-producer in two interpleaders but disclaimed any interest in the fund. See 292 F. Supp. 629,

631-632. The Cities Service, Northern, and National extraction plants are all in Kansas. The Phillips plants are in Texas.

The contracts call for the construction of plants requiring capital investments of millions of dollars. The separation of helium from natural gas is accomplished by an expensive and complicated process whereby the gas is put under high pressure and is cooled to extreme temperatures. The other constituents of the gas liquefy and separate, leaving the helium and smaller quantities of other constituents as the remaining gas. The crude helium-gas mixture is defined in the contracts as "the gaseous product resulting from the helium extraction process . . . [and] comprised of helium predominately together with other constituents of the natural gas." In actual operations the delivered gas mixture is about 70% helium and 30% nitrogen. The gas mixture is transmitted by a government pipeline to the Cliffside, Texas, underground storage reservoir. When needed it is withdrawn and refined prior to sale to about 99.99% purity.

The contract prices apply only to volumes of contained helium. The initial prices, all subject to escalation, are $11.24 per Mcf for Northern Helex, $11.74 for Cities Service Helex, $11.78 for National Helium, and $10.30 for Phillips Petroleum. Under each contract the United States is obligated to purchase the total helium production for 22 years limited to stated annual dollar maximum amounts which are $9,500,000 in the Northern Helex contract, $9,100,000 in the Cities Service contract, $15,200,000 in the National Helium contract, and $13,700,000 in the Phillips contract. The refined helium is sold to both federal and non-federal users at $35 per Mcf, a price set by the Secretary of the Interior pursuant to the 1960 amendments.

The trial below was restricted to the issue of liability and no determination was made of the value of the helium-bearing gas. The court did point out that in the 1958 contract between the government and Colorado Interstate Gas

Company for the Keyes plant "the contract requires that the United States pay the company $2.00 for the right to process sufficient gas to yield one thousand cubic feet of helium." 292 F.Supp. at 652. The evidence shows that in arriving at the unit prices in the Helex contracts the government negotiated "on the basis of costs comparable to those it would incur in a government-owned plant * * * ." Ibid at 657. Included in the cost build-up was a payment of $2 per Mcf for helium "contained in natural gas delivered at the extraction plant for processing." Ibid. We express no opinion as to what such value actually is. For the purpose of this opinion, it is enough to say that recognition of helium value in the volumes of gas processed in the plants results in a price substantially higher than the FPC service rate.

The typical contract between a lessee-producer and a pipeline contains a recital clause, a definition of gas, a dedication of described acreage, reservations if any, a statement of quantities, pricing provisions in terms of Mcf ordinarily with escalation, arbitration, or negotiation provisions, quality standards based on Btu content and impurities, statement of duration of contract, methods of measurement, billing and payment procedures, and warranties of title. The trial court's analysis of these contracts need not be repeated here. See 292 F.Supp. at 669-672.

The lessee-producers say that gas and natural gas as used in the contracts mean gaseous hydrocarbons and hence do not include helium. They rely on definitions found in Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 8 Cir., 359 F.2d 675, 680-684, and Deep South Oil Company of Texas v. Federal Power Commission, 5 Cir., 247 F.2d 882, 888, and on various governmental publications and bulletins. The trial court, after referring to conflicting testimony of industry uses, found that no such usage existed and commented that no gas naturally occurring in the Hugoton area consists solely of hydrocarbons. See 292 F.Supp. at 672-673. We are bound by this finding because

it is supported by substantial evidence and is not clearly erroneous.

Relying on the quality clauses calling for Btu adjustments, the lessee-producers argue that the pipelines purchased not natural gas but energy and that the energy is derived solely from hydrocarbons. The effect of these adjustments is emphasized in the separate brief of Pan American Petroleum Corporation which has a contract with Cities Service covering approximately 600,000 acres and 725 wells. Certain of the gas is unmerchantable unless mixed with other gas. Pan American says in substance that it is penalized by the price reduction and then Cities Service uses helium, one of the components causing the reduction, to make a profit.

In Permian Basin Area Rate Cases, 390 U.S. 747, 809-813, the Court approved quality adjustments dependent on Btu content. In our opinion provisions for such adjustments do not convert the contracts into sales of energy. The contracts provide for the sale and purchase of gas on a volumetric basis. The district court was correct in holding that "the plain language of contracts providing for the purchase of *gas*" controls. See 292 F.Supp. at 676.

This brings us to what we consider to be the decisive point. Helium, a commodity not regulated in price, is produced as a component of natural gas which is price-regulated. The problem is whether the FPC service rate for natural gas includes the contained helium.

There can be no doubt of the power and duty of FPC to regulate the price of natural gas transmitted interstate for resale. The objective of such regulation is the protection of the consumer. The FPC has no interest in the components of the gas other than the effect which they may have on its quality as a fuel. The Bureau of Mines is concerned with prevention of helium waste which occurs when the gas consumers vent it into the atmosphere with fuel combustion residue.

Section 15 of the 1960 Helium Act Amendments, 50 U.S.C. § 167m, declares the purposes of the statute to be the encouragement of individual enterprise in the development of helium and the assurance of a sustained supply of helium for governmental activities. The Secretary of Interior is authorized to make long-term contracts for the acquisition, processing, and conservation of helium. He has the eminent-domain power to acquire the helium in helium-bearing natural gas. A new basis is provided for establishing the price of helium. The owners of helium extraction plants may not sell to a private purchaser at a price lower than that paid by a government agency. The licensing of private sales is under regulations made by the Secretary. Appropriate provisions are made for financing the program.

The argument centers around § 11, 50 U.S.C. § 167i.[5] This says that the Natural Gas Act does not apply "to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled." It also provides that in the determination of rates of a natural gas company there shall be excluded (1) all income from helium, (2) all direct costs in the extraction, processing,

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[5] This section reads in its entirety:

"The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis."

transportation, and storage of helium, and (3) the portion of joint costs allocated to helium "on a volumetric basis."

Senate Report No. 1814, 2 U.S. Cong. & Adm. News '60, pp. 3595, 3599, succinctly states the purpose of this section.

> "Section 11 covers the jurisdiction of the Federal Power Commission in this area. The section makes it clear that the Federal Power Commission retains its jurisdiction over natural gas containing helium but has no jurisdiction over helium itself."

Other legislative history confirms this purpose.[6]

The only decided case concerning § 11 is Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 8 Cir., 359 F.2d 675. Panhandle applied to FPC for a certificate to use its pipeline system to transport gas to the National helium plant. The court said that plant shrinkage of the gas stream consisted of fuel gas, helium, liquefied hydrocarbons, and purge. FPC ordered Panhandle to amend its application to cover hydrocarbons which were liquefied and sold as well as the fuel gas. Panhandle sought court review and urged that the FPC order violated § 11. The court held that it did not and sustained the order on the basis that it applied only to the transportation of hydrocarbons, not helium. The court reviewed the legislative history of § 11 and concluded that FPC had no jurisdiction over the helium either while commingled or after extraction and that such exemption does not prevent FPC from exercising jurisdiction over helium-bearing gas. Ibid at 679.

The trial court in the case at bar concluded that § 11 does not alter the scope of the gas purchase contracts and

> " • • • does not *require* that persons contracting for the sale of gas contract separately for the sale of

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[6] See House Report No. 1552, 88th Congress. Debates in the House and Senate are found in 106 Cong. Rec. pages 9089-9095, 15119-15125, 18536-18538, 18544-18546, 18602-18609, 18902-18904. These appear in the trial record as Helex Ex. 281.

the helium constituent. It merely permits them to do so, and when they have not, the contract must stand as it is written." 292 F.Supp. at 680.

On the record presented, the denial to the lessee-producers of any recourse under the non-applicability clause of § 11 is startling. The evidence is convincing that 99% of the nation's recoverable helium supply is in the Hugoton area, that this area was about 95% developed before the 1960 amendments, and that, with insignificant exceptions, the controlling contracts had been executed long before 1960. The effect of the trial court's decision is to deny application of § 11 to the facts presented. We find nothing in the legislative history, and our attention is directed to nothing therein, which shows a congressional intent to deprive the lessee-producers of all benefit from the enhanced helium value, to deny the landowners royalty on the increased value of the gas produced from their lands, or to permit the pipelines to retain all profit from the helium value by obtaining the commingled helium at the FPC service rate.

The issue must be determined in the context in which it is presented. "The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas.' CATCO, Atlantic Refining Co. v. Public Service Commission of N.Y., 360 U.S. at 388, 79 S. Ct. at 1253. The Helium Act Amendments are designed to assure a sustained suppy of helium for governmental and industrial needs. The Natural Gas Act and the Helium Act Amendments must, if possible, be reconciled to produce a "symmetrical whole." Panhandle Eastern Pipe Line Company v. Federal Power Commission, 8 Cir., 359 F.2d 675, 679.

Some incidental matters must be mentioned. Section 2(3) of the 1960 amendments, 50 U.S.C. § 167(3), defines "helium-bearing natural gas" and "helium-gas mixture" to mean respectively, "natural gas and gas mixtures containing three-tenths of 1 per centum or more of helium by volume." We find no pertinency in this because § 11, which

relates to the applicability of the Natural Gas Act, uses neither phrase.

Section 5(a), 50 U.S.C. § 167c(a), authorizes regulations for licensing sales and transportation of helium and says that:

> "For the purpose of this section, the term 'helium' shall mean helium, after extraction from helium-bearing natural gas or helium-gas mixtures, in a refined or semirefined state suitable for use."

Section 5 has nothing to do with § 11. To read its definition of helium into § 11 would be to delete the words "prior to" from § 11 and the words "For the purpose of this section" from § 5.

The lessee-producers point out the familiar and common statement of the FPC in its rate orders that it is "acting pursuant to the authority granted by the Natural Gas Act." See e.g. Order No. 264, 29 F.P.C. 589. This is a statement of the statutory justification of the action taken. We find it of no pertinence in the reconciliation of the two statutes.

Section 11, after stating the nonapplicability of the Natural Gas Act, excludes from consideration in FPC rate determination all income from sale of helium, all direct costs pertaining to helium, and a portion of the indirect costs allocated to helium on a volumetric basis. In our opinion the purpose of these provisions is to encourage private participation in the helium program by assurance that rate of return will not be determined by conventional FPC standards. The statute furnishes a profit incentive. The mentioned provisions do not detract from the preceding clause of § 11 declaring the nonapplicability of the Natural Gas Act. We find nothing in the record which indicates any use of the exclusions which would have effect on the construction of § 11.

The situation is that a nonregulated commodity (helium) is necessarily produced in conjunction with a regulated commodity (natural gas). The Helex companies insist that the price for the regulated commodity includes the non-

regulated commodity. The lessee-producers emphasize the rule of rate regulation that there can be no deviation from the lawful rate for a regulated commodity or service. See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, and Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246. They point to several decisions which hold that the furnishing of services was an improper deviation from ICC rates. See United States v. Wabash R. R. Co., 321 U.S. 403 (spotting freight cars in plant yard); Baltimore & Ohio R. R. Co. v. United States, 305 U.S. 507 (in-transit warehousing at less than cost); and Lowden v. Simonds-Shields-Londale Grain Co., 306 U.S. 516 (installation without charge of grain doors in freight cars). The lessee-producers equate the nonpayment for the helium content of the gas with the noncollection of paid costs in the railroad rebate cases.

In answer the Helex companies say that under the Natural Gas Act the FPC fixes ceiling prices and does not impose a flat rate. Although this is true, the ceiling rate, or the lower filed rate, is the lawful rate and there may be no deviation therefrom. See Western Union Telegraph Co. v. Esteve Brothers & Co., 256 U.S. 566, 571. Section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b), forbids "any undue preference or advantage" to any person.

The Helex companies deny any prejudice or disadvantage. They say that the lessee-producers contracted to deliver the gas stream in its entirety and, absent an express reservation, the buyer gets the whole stream for such purposes as it may determine. The premise ignores the effect of the Natural Gas Act. Although the Act does not abrogate private rate contracts as such, see United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 338, it makes fundamental changes in those contracts. The rate must be just and reasonable and, if it is not, the FPC changes it. Provisions for price escalation or price changes by arbitration or renegotiation are rendered ineffective by regulations permitting summary rejection of increased rates based thereon. See Federal Power Commission v. Texaco, Inc., 377 U.S. 33. Contract provisions for period

of duration are overriden by unlimited certificates, see Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U.S. 137, 156, with the result that the grant of a certificate carries with it a dedication of the gas for the life of the field unless FPC approves withdrawal. Although the contracts are not abrogated, their provisions on price and term are superseded by FPC regulation.

The basis of the Helex companies' argument is that there is a contract sale of commingled helium when it is sold as a component of the gas stream under FPC service rates. We are not persuaded. The protection of the Natural Gas Act is for the consumers, not the Helex companies.

In § 11 of the 1960 Helium Act Amendments, Congress has said that the Natural Gas Act is not applicable to helium operations "either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled." In our opinion this means what it says and, if the Natural Gas Act does not apply, a service rate fixed thereunder does not apply to sales of contained helium.

The Helex companies read into § 11 a distinction between the sale of helium as a separate commodity and by a separate agreement and a sale of helium as a component of the gas stream. They argue that there may be an additional payment for helium in the first instance but not in the second. A sale of the commingled helium as a component of the gas stream is a sale of helium "prior to * * * the separation of such helium from the natural gas with which it is commingled." Accordingly, the Natural Gas Act, and the FPC fixed service rates, do not apply.

In oral argument, but not in briefs, the Helex companies say that if title to the helium passes under the contracts, interpleader jurisdiction does not lie to permit recovery by the lessee-producers, and they rely on State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533-537, and Knoll v. Socony Mobil Oil Co., 10 Cir., 369 F.2d 425, 429, cert. denied 386 U.S. 977. The interpleaded fund is the money paid and to be paid by the United States to the Helex com-

panies for the helium gas mixture. The lessee-producers claim a part of that fund on the ground that they have not been paid for the helium content of the gas. In our opinion this is a claim to the fund and is within interpleader jurisdiction. The situation is not changed by the fact that the claim covers only a part of the fund or by the fact that volume, and hence value, is measured at the delivery point. The situation is different from that confronting us in connection with the landowners' claims against the lessee-producers on the grounds of failure to market and abandonment. Those claims have no relation to the fund.

The lessee-producers argue that they are entitled to payment of the reasonable value of the helium under equitable principles of quantum meruit and unjust enrichment arising out of mistake. They emphasize the enormity of the mistake by saying that under the three contracts in the interpleaders a total of $743,600,000 will be paid for crude helium in a 22-year period and claim that $125,000,000 of that, as a bare minimum, represents the value of commingled helium before extraction. They contrast this with the negative or de minimis value which the parties mistakenly assumed it would be.

The Helex companies insist that the equities favor them. They say that they built the multi-million dollar extraction plants and assumed the necessary risks. They charge that the lessee-producers stood idly by while the risks were taken, the money invested, and the work done by others. In support of the principle that equity does not take from those who earn it and reward those who silently stand aside and await the success of the enterprise, they cite the refreshing authority found in the folk-tale of the Little Red Hen.[7]

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[7] As quoted in the brief of the Helex companies: "You remember that I planted the wheat and cut it, I threshed it and carried it to mill, I made the bread and baked it—and now all of you would help me eat it! No, indeed." See V. S. Hutchinson, Chimney Corner Stories (1925) 63, 65, published by Minton Balch and Company, New York.

The lessee-producers answer that, if the remarks of the Little Red Hen are codified as a principle of equity, they are supported thereby because they obtained leases and conducted drilling, production, and delivery operations which placed the commingled helium into the hands of the Helex companies.

The activities of the Little Red Hen were not those of a public utility, and neither the product nor the ingredients thereof were subject to governmental rate regulation. Therein lies the difference. In our opinion private contract law and the principles applicable thereto are not controlling. This makes it unnecessary for us to delve into the many cases and texts bearing on the respective rights of parties to private contracts.

Common provisions of the gas purchase contracts call for periodic price escalation, arbitration or renegotiation. These provisions have been largely nullified by FPC regulations. The situation is illustrated by the plight of Ashland Oil & Refining Company which sells to Cities Service gas from over 100 Hugoton wells. The 1948 contract has a special price arbitration provision operative on 5-year periods. In 1961 the rate was raised to 12¢ plus 1.75¢ for gathering. In the 1966 negotiations for a new price Ashland offered to accept a price applicable to natural gas under FPC jurisdiction plus a separate price for non-jurisdictional helium. Cities Service insisted on a single price because the contract did not provide for dual price structure. The matter went to arbitration under an agreement to include helium in the arbitrated price. The arbitrator fixed a price of 15¢ plus 1.75¢ for gathering. FPC suspended the rate and after suspension it went into effect subject to refund with interest. The Hugoton-Anadarko area rate proceeding fixed a price of 11.3¢ for non-gathered and 13.2¢ for gathered natural gas. The result shows the inability of a lessee-producer to use a price arbitration provision to secure payment for helium content of natural gas.

The trouble lies in the statutory jurisdiction of the FPC on the one hand and of the Department of the Interior, acting through the Bureau of Mines, on the other. The FPC has jurisdiction over natural gas produced, sold and transmitted interstate for resale. It has no jurisdiction over the price of helium. Phillips Petroleum Company v. Ashland Oil & Refining Company, 40 F.P.C. 390, 391-392. The Bureau of Mines has jurisdiction over the conservation of helium. It has no statutory power to fix the value of the contained helium delivered to the pipelines and their affiliates. In 1960 the greatest helium waste was by FPC protected consumers who vented the helium with fuel combustion residues. The FPC seeks to obtain the objectives of the Natural Gas Act through rate control, one aspect of which is the negation of price increase clauses. The lessee-producers cannot secure any increased value from FPC for the helium content of the gas which they produce and sell.

The lessee-producers fall into the void created by the two statutes. Neither the FPC nor the Bureau of Mines has jurisdiction over the helium value of the natural gas. Although the gas purchase contracts have not been abrogated, the price provisions thereof have been superseded by FPC rate regulation. The regulated lessee-producers must continue to sell the dedicated gas and have no statutory or contractual method of obtaining any benefit for the increased value. Two results are possible. The first is that the lessee-producers must deliver the gas at the FPC service rate, based on fuel value, and receive nothing for the helium value. This produces a windfall for the pipelines and their Helex subsidiaries. The second is that the lessee-producers are entitled to the reasonable value of the contained helium. This means that the landowners will receive royalties on the value of the helium produced from their lands and the lessee-producers will receive value for the helium content of the natural gas which has been produced by their efforts. We believe that satis-

factory utility regulation requires the second result. Otherwise, a utility rate may be used to obtain a commodity or service which is not within the contemplation of that rate.

The allowance of a price, above the FPC service rate, for the helium content of Hugoton natural gas, does not adversely effect gas consumers. Their rights to just and reasonable rates are still protected by the Natural Gas Act and the FPC and are not increased by either recognition or payment of helium values.

In our opinion the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants. Hence, the lessee-producers recover from the fund the reasonable value of the helium content of the processed gas and they in turn must pay royalty thereon to the landowners. We believe that this result is a valid reconciliation of the statutes and a proper determination of the rights of the parties.

Our conclusion that payment is required relates only to the helium content of the processed gas. The record shows that only about 44% of the produced gas goes through the separation plants. We do not intend that payment to the lessee-producers or royalties to the landowners should include anything for the helium content of the nonprocessed gas. The record does not show any market for the helium commingled with the nonprocessed gas.

The reliance of the Helex companies on the warranty of title provisions of the gas purchase contracts does not impress us. The claim of the lessee-producers is that the Helex companies have received the gas without paying for the helium content. In ordinary circumstances restitution or rescission might be an available remedy. Here, neither is practical or legally possible, but when payment is

required and not made, the title fails just as surely as it does where either restitution or rescission is appropriate.

The Helex companies urge that the helium content cannot be traced back to the delivery points. The landowners and lessee-producers disagree. On the state of the record we reject the position of the Helex companies. The helium content can be measured at the location of the orifice meters which determine the volumes. The lessee-producers seem to have no difficulty in determining volumes as a basis for royalty payments. Our attention is directed to nothing which makes the determination of the helium content either difficult or impossible.

One issue remains. The trial court assessed the costs, including attorneys' fees, against the fund. Such costs are estimated to be between a million and a million and a half dollars. The Helex companies say that such assessment of costs violates the principles stated in Hobbs v. McLean, 117 U.S. 567, 582. Our disposition of the case makes necessary reconsideration of the cost issue by the trial court. We express no opinion with regard thereto.

In No. W-3009, the Tort Claims action, and in No. W-3159, the Tucker Act action, the judgments are severally affirmed.

In the interpleader actions, the judgments are severally reversed and the cases remanded to the district court for further consideration in the light of this opinion.

The assessment of costs on these appeals is subject to future court action. The court notes that the 88 appeals have been presented and determined on a consolidated record. Within 14 days from the filing of this opinion, or such further time as the court may allow, the parties shall present their itemized and verified bills of costs, if any, and whatever statements they may care to make in regard to the division and assessment of costs.

APPENDIX D

Opinion of the United States District Court for the District of Kansas, Dated September 7, 1968 (292 F.Supp. 619)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. KC-1969 (and Consolidated Civil Actions, Nos. KC-1945, KC-1946, KC-1947, KC-1948, KC-1980, W-3009, and W-3159)

NORTHERN NATURAL GAS COMPANY, ET AL., *Plaintiffs*,

v.

RALPH GROUNDS, HENRY HITCH, ET AL., *Defendants*.

MEMORANDUM
FINDINGS OF FACT AND CONCLUSIONS OF LAW

NATURE OF ACTIONS

These eight consolidated civil actions come before the Court following a protracted trail for findings of fact and conclusions of law with respect to the issues relating to liability. Six of the cases are actions in the nature of interpleader. Two of the actions are for conversion and reverse condemnation.

All of these actions involve the ownership of helium[1]

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[1] Helium is a colorless, odorless, and inert gas. It is the second lightest substance, second only to hydrogen. It can be liquefied only at —452.1°F., nearly absolute zero. It will not react chemically or physically with any other elements [LPX 5, p. 10; LPX 19, p.13; LPX 221, p. 431; LOX 792, Tr. 8:583-599].

References to testimony are designated by the volume numbers and pages of the Transcript. References to exhibits presented on behalf of the pipeline companies, the Helex companies, and the United States are designated as "Helex Ex."; the landowner exhibits are designated "LOX", and the lessee-producer exhibits are designated "LPX". Exhibits of individual lessee-producer exhibits are designated by company name, i.e. "Mobil Ex.—", etc.

contained in or extracted from natural gas [2] and produced from wells drilled in the Chase Group of the Permian formation of the Hugoton gas area in Kansas, Oklahoma, and Texas. Helium-bearing natural gas is produced from these lands by producers operating under leases granted by landowners and other owners of mineral interests in these lands. This helium-bearing natural gas is then sold by these producers to pipeline companies, who, generally speaking, transport this gas for resale for industrial and consumer use through the mid-Continental United States. In the early 1960's, pursuant to a helium conservation program approved by the Congress and implemented by the Bureau of Mines and the Department of Interior, four companies contracted to sell helium to the United States. The companies proposed to extract this helium from gas in helium processing plants built on or near large volume pipelines. The United States agreed to purchase from each company all the extracted helium up to a contract dollar maximum ranging from nine to 15 million dollars a year. From these purchases, the United States supplies its current demands, as well as builds a conserved supply in a Texas storage reservoir.

The fund involved in each interpleader suit is the money paid and to be paid by the United States to the interpleading plaintiffs for the helium-gas mixture produced and sold by them. The claimants to the fund may be grouped, generally speaking, into three classes, referred to collectively herein as the "landowners," the "lessee-producers," and the "helex group," which includes the helium extraction and their parent pipeline companies. The landowners claim, in brief, that helium did not pass to their lessees under the oil and gas, or merely gas, leases by virtue of which natural gas has been and is being produced from their properties.

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[2] We use the term "natural gas" to mean (the condition of) the "aeriform fluid" at the time that it emerges from the wellhead regardless of its composition.

The lessee-producers oppose this position, assert that helium did in fact pass under those leases, but that it passed no further, i.e., that it did not pass to the pipeline companies under the gas purchase contracts under which lessee producers deliver natural gas from the lands in question. The helex group, comprising three pipeline companies and their subsidiary or parent companies, and Phillips Petroleum Company each assert that helium did in fact pass under the oil and gas leases to the lessee-producer, that it passed further, under the gas purchase contracts, and that it was theirs to separate out from the natural gas stream in their possession and sell to the United States. The United States concurs in this position.

In the course of our preparation of Findings of Fact and Conclusions of Law we have reviewed and disposed of the motions to which the parties have taken exception in the light of the evidence before us.

The Parties

Identification of the parties to these actions and statement of their positions will clarify our views. The parties in the interpleader suits, KC-1945, KC-1946, KC-1947, KC-1948, KC-1969, and KC-1980 all claim ownership of or an interest in the interpleaded fund in the particular case.

KC-1945.

Cities Service Gas Company was the original interpleading plaintiff in Cases KC-1945, KC-1948. It was subsequently joined, however, by Cities Service Helex, Inc., and Cities Service Cryogenics, Inc., (formerly Cities Service Helium, Inc.), both wholly owned subsidiaries of Cities Service Company, which holds, also, upwards of 79 per cent of the stock of Cities Service Gas Company. These plaintiff corporations are organized under the laws of the State of Delaware and have principal places of business in Oklahoma.

It is necessary to state the contractual relationships between the three parties plaintiff. In brief, Cities Service Gas Company conveyed to Cities Service Helium by contract executed August 17, 1961, "for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations" the right to all helium contained in gas purchased by it and gathered to a central point adjacent to its Grant County, Kansas compressor station, together with the right to extract such helium.[3] Cities Service Helium in turn, by contract dated the following day, August 18, 1961, conveyed these helium rights to Cities Service Helex, Inc., which agreed to pay therefor 1.35 cents for each thousand cubic feet (Mcf) of gas delivered to Cities Service Helex for helium processing.[4] Shortly thereafter, on August 22, 1961, Cities Service Helex contracted to sell helium to the United States.[5]

Cities Service Helex contracted with the Cities Service Gas Company, on September 11, 1961, for the purchase of gas required for operation of its helium extraction plant, and agreed to sell to the Cities Service Oil Company the crude liquid hydrocarbons recovered in the helium extraction process.[6] Cities Service Gas Company is referred to as "Cities."

The named defendant individuals, O. W. Heger, Almeta Redfield, et al., appear individually and as representatives of a landowner class consisting of

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken

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[3] LPX 150.

[4] LPX 151.

[5] LPX 106.

[6] LPX 152; LOX 508.

> into the possession by the United States of America in Grant County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Cities Service Helex, Inc., dated August 22, 1961.'"[7]

The named defendant lessee-producer is Mobil Oil Corporation (formerly Socony Mobil Oil Company), a corporation organized under the laws of the State of New York, with its principal place of business there. Mobil appears both individually and as representative of a lessee-producer class, which

> ". . . consists of the persons, firms and corporations denominated 'lessee-producers,' who are the owners of leasehold interests in . . . oil and gas leases [described in the foregoing paragraph] . . ., and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Cities Service Gas Company, which helium has been, is being, and will be removed and delivered by plaintiff in interpleader, Cities Service Helex, Inc., into the possession of the United States of America at the delivery point described in that certain contract between the United States of America and Cities Service Helex, Inc., dated August 22, 1961."[8]

Cities purchases gas from Mobil pursuant to at least four contracts which are filed as rate schedules of Mobil with the Federal Power Commission.[9] Whether gas delivered under all of these contracts is processed for helium does not clearly appear.[10] Representative lease forms under

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[7] Dkt. 1135, KC-1969. In the documentation of the finding "Dkt. ——" followed by case number refers to the docket sheet prepared by the Clerk of the Court for each case; however, after consolidation most pleadings were filed in KC-1969, as the Consolidated file.

[8] Ibid.

[9] Mobil Exs. 11, 12, 13 and 14, being FPC Schedule No. 3, 89, 261 and 262.

[10] Tr. 34:3482-83.

which Mobil produces gas for sale to Cities are in evidence.[11]

KC-1946.

The plaintiffs are identical with those in the preceding case. The named individual defendants, Vivian W. Schuett, R. J. Stuckey, et al., appear both individually and as representatives of the class of landowners and owners of mineral interests as defined in the preceding case. The named defendant lessee-producer is the Ashland Oil and Gas Company, a corporation organized and existing under the laws of the Commonwealth of Kentucky, with its principal place of business in that state. Ashland appears both individually and as representative of the same class of leasehold interest owners as defined in the preceding case, KC-1945.

Ashland produces gas from a block of 119 wells located principally in Grant and Haskell counties, Kansas, and delivers it through an approximately 150-mile gathering system to Cities at a point near the helium extraction plant operated by Cities Service Helex, Inc., in Grant County, Kansas. Representative forms of these leases under which gas is produced for this sale are compiled in Ashland Exhibit 1. These leases were acquired by Ashland on March 1, 1963, from the United Carbon Company, parent of United Producing Company, a previous owner thereof.[12]

The contract under which Ashland delivers gas to Cities was executed originally on March 12, 1948, by United Producing Company, which agreed therein to deliver natural gas to Cities so long as it could be produced from the subject leaseholds in commercial quantities.[13] On October 1, 1954, this contract was filed with the Federal Power Commission as United's FPC Rate Schedule No. 111, and

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[11] Mobil Ex. 1; Dkt. 217, KC-1969.

[12] Ashland Ex. 18-20.

[13] Ashland Ex. 5.

upon acquisition of the leaseholds by Ashland, and FPC approval of the transfer, it became Ashland's FPC Rate Schedule No. 111. Ashland also succeeded to a second gas purchase contract with Cities executed August, 1953, by United now being Ashland's FPC Rate Schedule No. 112. Gas delivered under this contract is not processed for the separation of helium, however.[14]

KC-1947.

The plaintiffs are identical with those in each of the preceding cases. The named defendant individuals, Katherine R. Adams, J. H. McMorran, et al., appear individually and as representatives of the class of landowners and owners of mineral interests as defined in the first case, KC-1945. The named lessee-producer is Columbian Fuel Corporation organized under the laws of the State of Delaware, with its principal place of business in the State of New York. Columbian appears individually and as representative of the class of leasehold interest owners defined in the first case, KC-1945.

Columbian sells natural gas to Cities Service Gas under two contracts, executed November 18, 1949, and June 16, 1949.[15] These contracts are filed with the Federal Power Commission, and are included in Columbian's FPC Rate Schedule Nos. 7 and 37. Columbian delivers gas to Cities under a third contract, its FPC Rate Schedule No. 10, but gas delivered thereunder apparently is not processed for helium extraction.[16] Columbian delivers gas to Cities at the tailgate of Mobil's Hickok Plant in Grant County, Kansas.

KC-1948.

The plaintiffs are identical with those in each of the preceding cases. The named defendant individuals, Bloyd

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[14] Tr. 34:3461

[15] Columbian Exs. 8, 9.

[16] Columbian Ex. 10.

Burgess, John J. Cecil, et al., appear individually and as representatives of the class of landowners and owners of mineral interests as defined in the first case, KC-1945. The named defendant lessee-producer is the Pan American Petroleum Corporation, organized under the laws of the State of Delaware, with its principal place of business in the State of Oklahoma. Pan American appears individually and as representative of the class of leasehold interest holders as defined for the first case, KC-1945.

Pan American sells gas to Cities under a single contract executed June 23, 1950, by Stanolind Oil and Gas Company, Pan American's predecessor, the contract covering gas produced from approximately 400,000 to 600,000 acres in Kansas Hugoton Field so long as it can be had in commercial quantities. This contract as amended is included in Pan American's FPC Rate Schedule No. 84.[17] Copies of representatives lease forms under which this gas is produced are in evidence.[18]

Since execution of this contract in 1950, Pan American has executed approximately 168 "farmout" agreements, by which it agreed to assign various leases covering areas dedicated under that contract, these agreements providing specifically that any production therefrom is subject to the Pan American—Cities contract. Under the standard farmout agreement, the farmout operator drills at his own expense, and upon completion of a commercial well, he becomes owner of the working interest and usually operates the well or arranges for its operation, the assignor retaining a royalty. These operators are independent producers who were required to obtain certificates of public convenience and necessity covering their sales to the Cities Service Gas Company. None of these operators was made a party to this action. By court order they fall within the

[17] Pan American Ex. 4.

[18] Pan American Ex. 1.

class of owners of leasehold interests represented by Pan American as a lessee-producer.[19]

KC-1969.

Plaintiffs in this interpleader action are Northern Natural Gas Company (Northern), an interstate pipeline company, and two wholly-owned subsidiaries, Northern Helex Company (formerly Helex, Inc.) and Northern Gas Products Company, all corporations organized under the laws of the State of Delaware, with their principal places of business in the State of Nebraska.

The named defendant individuals, Ralph Grounds, Henry Hitch, and approximately five hundred other named individuals, appear individually and as representatives of a class defined by the court as comprising

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium . . . is being or will be taken into the possession by the United States of America in Ellsworth County, Kansas at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Northern Helex, Inc., (formerly Helex Company) dated August 15, 1961."[20]

Eight named lessee-producer companies are defendants in this action.

Ashland delivers natural gas to Northern under two contracts, executed August 25, 1943, and June 28, 1954, these are included in Ashland's FPC Rate Schedule Nos. 116 and 122, respectively.[21]

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[19] Page 13, infra.

[20] Dkt. 1135, KC-1969.

[21] Ashland Exs. 7, 10.

Cities Service Oil, a Delaware corporation with its principal place of business in the State of Oklahoma, delivers natural gas to Northern under eleven contracts, these being Cities Service Oil FPC Rate Schedule Nos. 53, 70, 89, 166-171, 190, and 191.[22]

Gulf Oil Corporation, a Pennsylvania corporation with its principal place of business there, delivers natural gas to Northern under a single contract, found in Gulf's FPC Rate Schedule No. 117.[23] Representative forms of leases under which this gas is produced are in evidence.[24]

Helmerich & Payne, Inc., is an Oklahoma corporation with its principal place of business in that state. It delivers natural gas to Northern under eight contracts, these being its FPC Rate Schedule Nos. 1, 2, 4-8.[25] Representative forms of leases under which gas is produced for delivery thereunder are also in evidence.[26]

Mapco Production Company, a Delaware corporation with its principal place of business in Oklahoma, delivers gas to Northern under one contract, dated September, 1949, and is Mapco FPC Rate Schedule No. 1, formerly Hugoton Plains FPC Schedule No. 1. Representative forms of leases under which gas is produced for delivery under this contract are in evidence.[27]

Mobil delivers gas to Northern under nine contracts, included in its FPC Rate Schedule Nos. 32, 71, 85, 158,

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[22] Cities Service Oil Ex. 7-16. Representative forms of leases under which gas is produced for delivery to both Northern and Panhandle Eastern Pipeline Company, a party to KC-1980, are assembled in Cities Service Oil Co. Ex. 17.

[23] Gulf Ex. 3.

[24] Gulf Exs. 1, 2; Dkt. 166, 920, KC-1969.

[25] Helmerich & Payne Exs. 3-9.

[26] Helmerich & Payne Exs. 1, 2; Dkt. 250, 1232, 1235, KC-1969.

[27] Mapco Ex. 1; Dkt. 255, KC-1969.

179, 281, 232, 284, and 326.[28] Representative forms of leases are in evidence.[29]

Texaco, a Delaware corporation with its principal place of business in states other than Kansas and Nebraska, delivers gas to Northern under fourteen contracts, these are included in Texaco FPC Rate Schedule Nos. 10, 11, 12, 71, 106-112, 129, 147 and 317. Representative lease forms under which gas is produced for these sales are in evidence.[30]

These named lessee-producers appear individually and as representatives of a class defined by the court as consisting of:

> ". . . the persons, firms and corporations denominated 'lessee-producers' who are the owners of leasehold interests in the oil and gas leases . . . [from which gas is produced for delivery to Northern Natural Gas Company] and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Northern Natural Gas Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader [Northern Helex, Inc.], into the possession of the United States of America at the delivery point described in that certain contract between the United States and [Northern Helex, Inc.], (formerly Helex Company), dated August 15, 1961."[31]

Phillips Petroleum Company, a Delaware corporation with its principal place of business in the State of Delaware, was named as an original defendant lessee-producer of gas. Phillips, however, makes no claim to the interpleaded fund, and urges that having disclaimed any in-

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[28] Mobil Exs. 2-9.

[29] Mobil Exs. 1, 1A.

[30] Texaco Exs. 1, 2; Dkt. 199, 1231, KC-1969 (Leases); Texaco Ex. 3-14, 17 and 33.

[31] Dkt. 1135, KC-1969.

terest in the subject matter of the action upon which the court's jurisdiction depends, it should be dismissed therefrom.

Counsel for landowners and Phillips disagree whether the landowners assert cross-claims against Phillips in KC-1969. After examination of the pleadings and pre-trial order, we find that landowners have asserted two cross-claims against Phillips; first, a denial that Phillips has any interest in the fund (which Phillips concedes) and secondly, on the premse that leases do cover helium, landowners seek damages from Phillips on the ground that as a lessee-producer, it has failed to market the helium portion of natural gas with reasonable diligence.

KC-1980.

The plaintiff in this interpleader action is National Helium Corporation, organized and existng under the laws of the State of Delaware, with its principal place of business in the State of Kansas.

The Panhandle Eastern Pipe Line Company, a Delaware corporation with its principal place of business in the State of Missouri, was made a party defendant by National Helium. Panhandle owns fifty per cent of the stock of National Helium, with National Chemical and Distillers Company owning the remaining fifty per cent.

No lessee-producer was named as an original defendant in this case. Eight named lessee-producers were first introduced into this case by a third-party complaint filed by defendant Panhandle,[22] wherein Panhandle sought judgment against the named third-party defendants "for all sums that may be adjudged against Panhandle *in favor of National Helium . . . or the landowners* with respect to gas purchased by Panhandle from, and delivered to Panhandle by such third-party defendants . . ." Prior to that time,

[22] Dkt. 54, KC-1980.

landowners had filed counterclaims and crossclaims against National Helium and Panhandle respectively, seeking judgment for alleged conversion of helium. National Helium had never asserted any liability against Panhandle, however, so as to authorize a third-party complaint under Rule 14, F.R. Civ.P., which provides that a "defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.*" [Emphasis supplied.]

The lessee-producers answered without objecting to improper joinder under Rule 14. They have tendered precisely the same issues for decision in KC-1980 as in the other interpleader cases where they were properly joined, and they have taken precisely the same positions in each of the interpleader cases. Had lessee-producers not asserted their claims to the fund in KC-1980, notwithstanding their third-party status, it would have been incumbent upon the court to join them as defendants under Rule 19, F.R. Civ.P. which provides, in pertinent part, that

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

It is clear that as a group, their presence was necessary to a full and complete adjudication of rights to the interpleaded fund. Failure to join them would have left a critical gap in the group of claimants necessary to complete determination of the ownership of helium, and the right to participate in the fund consisting of the proceeds from

its sale. We hold that the lessee-producers named in the third-party complaint are properly defendants, individually and as representatives of the class, and we deem them to have been joined under Rule 19. The named lessee-producer defendants are twelve in number.

Ashland delivers gas to Panhandle under eleven contracts, included in Ashland's FPC Rate Schedule Nos. 108, 109, 120, 121, 125, 135, 141, 142, 145, 148 and 177.[33]

Cabot Corporation, a Delaware corporation with its principal place of business in Massachusetts, delivers natural gas to Panhandle under eleven contracts, included in its FPC Rate Schedule Nos. 28, 35, 47, 69, 71, 41, 62, 75, 89, 33, and 66.[34]

Columbian delivers gas to Panhandle under seven contracts, these included in Columbian's FPC Rate Schedule Nos. 2, 31, 33, 36, 40, 75, and 136.[35]

The Shamrock Oil and Gas Corporation, since the commencement of this litigation, has become, as result of a merger, the Diamond Shamrock Corporation, and has been substituted therefor. It is a Delaware corporation, with its principal place of business in the State of Ohio. It delivers gas to Panhandle under four contracts, these included in Shamrock's FPC Rate Schedule Nos. 4, 24, 30, and 32.[36]

The Dorchester Gas Producing Company, a Delaware corporation with its principal place of business in the State of Texas, delivers gas to Panhandle under three agreements, two of which are gas exchange agreements, included in Dorchester's FPC Rate Schedule Nos. 4, 1 and 2.[37]

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[33] Ashland Exs. 3, 4, 8, 9, 11-17.

[34] Cabot Exs. 2-10, 13, 14.

[35] Cities Service Oil Exs. 1-6 (sic).

[36] Columbian Exs. 1-7 (sic).

[37] Dorchester Exs. 4, 5, 6.

Gulf delivers gas to Panhandle under eight contracts, being Gulf's FPC Rate Schedule Nos. 51, 68, 100, 167, 171, 200, 237, and 293.[38]

Helmerich & Payne, Inc. delivers gas to Panhandle under two gas purchase contracts, being Helmerich & Payne's FPC Rate Schedule Nos. 28 and 29.[39]

Mobil delivers gas to Panhandle under eleven contracts, being its FPC Rate Schedule Nos. 246, 223, 248, 299, 303, 11, 54, 385, 369, 301, and 245.[40]

Pan American delivers gas to Panhandle under eight contracts, being its FPC Rate Schedule Nos. 134, 194, 196, 221, 223, 276, 365, and 425.[41]

Texaco, Inc., delivers gas to Panhandle under twenty-two contracts, being its FPC Rate Schedule Nos. 142, 136, 152, 164, 171-173, 224, 230, 242, 244, 256, 289, 303, 304 309,, 315, 318, 344, 352, 353, and 367.[42]

Superior Oil Company is a Nevada corporation with its principal place of business in the State of Texas. Superior delivers gas to Panhandle under three contracts, included in its FPC Rate Schedule Nos. 110, 1, and 43.[43]

These named lessee-producer defendants appear individually and as representatives of a class defined by the court as comprising

> ". . . the persons, firms and corporations denominated 'lessee-producers,' who are the owners of leasehold interests in the oil and gas leases [from which gas is produced for delivery to Panhandle Eastern Pipe Line

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[38] Gulf Exs. 15-22.

[39] Helmerich & Payne Ex. 10.

[40] Mobil Exs. 15-25.

[41] Pan American Exs. 5-12.

[42] Texaco Exs. 15, 16, 18-32, 34-38.

[43] Superior Exs. 2, 3, and 4.

> Company] and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Panhandle Eastern Pipe Line Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader National Helium Corporation into the possession of the United States of America at the delivery point described in that certain contract between the United States and National Helium Corporation dated October 13, 1961."[44]

The named defendant individuals, Ralph Grounds, Henry Hitch, and approximately five hundered other individuals appear individually and as representatives of a class defined as comprising

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, or is being, or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken into possession by the United States of America in Seward County, Kansas at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader National Helium Corporation dated October 13, 1961."[45]

Phillips was introduced into this case as a third-party defendant by landowners, alleging underpayment of royalties on gas produced in Moore and Hansford Counties, Texas.[46] This claim has been withdrawn. The remaining counts of that third-party complaint were never addressed to Phillips, and it may not be required to respond to those claims for the first time after trial. Phillips' request for findings of fact and conclusions of law demonstrating the lack of independent jurisdictional grounds for the claim is therefore moot.

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[44] Dkt. 1135, KC-1969.

[45] Ibid.

[46] Dkt. 163, KC-1980.

We conclude in KC-1980 that lessee-producers are proper parties both individually and as representatives of a class; that Phillips must be dismissed on the ground that no claim is asserted against it.

W-3009.

The original plaintiffs in this case are Oliver S. Brown, Harry Lightcap, T. A. Dudley, Dan C. Sullivan, Jr., L. F. Roderick, Stanley Julian, the E. W. Campbell Estate, Ruth C. Rice, Executrix, Herbert and Norma Foster, Fred Shore and Hazel Shore, Gerald G. Finley, A. W. Klassen, John Alford, Robert Larrabee, Robert Larrabee as Executor of the Estate of Lee Larrabee, Deceased, Emil Schnellbacker, Wylie R. Gore, George H. Anderson, Ora V. Martin and Lela Z. Martin, and Gene Cyr. The intervening plaintiffs are Alfred Akers (Akin), Chester C. Clark, Dorothy M. Cox, Della M. Drake, John R. Jones, Bertha E. Kells, C. A. Kells, a/k/a Chester A. Kells, W. L. Lacey, L. G. Moore, Warden L. Noe, Bernard J. Nordling, Homer Leroy Parshall, Leone L. Parshall, Lillie Snare (Snarl), June Stegman as Guardian of Patricia A. Stegman, June Stegman as Guardian of Victor J. Stegman, and Edith Thompson. These parties appear individually and as representatives of a class defined by the court as consisting of:

> ". . . the persons, firms and corporations owning mineral interests in land from which helium has been, or is being severed from the ground in connection with or because of production under oil and gas leases, which helium has been, or is being taken into the possession of the defendant United States of America at points in Seward, Ellsworth or Grant Counties, Kansas, or Hansford or Moore Counties, Texas, described in the four following contracts:
>
> (a) Contract between United States of America and Helex Company, now Northern Helex Company, dated August 15, 1961.
>
> (b) Contract between United States of America and Cities Helex dated August 22, 1961.

(c) Contract between United States of America and National Helium dated October 13, 1961.

(d) Contract between United States of America and Phillips dated November 13, 1961."[47]

The United States is the sole defendant in this case. It has joined as third party defendants National Helium, Cities Service Helex, Inc., Northern Helex Company (formerly Helex Company) and Phillips, the parties to the four contracts recited in the foregoing paragraph.

W-3159.

The named original plaintiffs in this action are Ralph Grounds and Henry Hitch, Jr. Intervening plaintiffs are Robert Adams, C. Dale Duer, Hubert R. Elrod, Ruth F. Fischer, Zuba D. Jefferis, Alonzo C. Robinson, the John A. Spohn Estate, W. D. Ross and Herb Williams. These parties appear individually and as representatives of the class of plaintiff as defined in the preceding case, W-3009. Again, the United States is the sole defendant, and it has impleaded as third-party defendants the same four corporations impleaded in the preceding case, W-3009.

CLASS ACTIONS

The Court has, in the light of the evidence and recent decisions, reconsidered its rulings designating certain named representatives of described classes for the prosecution and defense of certain claims in each of the consolidated cases.

The basic prerequisities for maintenance of a class action are stated in Rule 23(a), F.R. Civ.P.:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the

[47] Dkt. 1135, KC-1969.

> class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

In addition, the action must satisfy one or more of four prerequisites stated in Rule 23(b).

By order filed January 16, 1967,[46] the Court defined the classes of landowners and lessee-producers in each interpleader case as set out supra under the heading, "Parties." In addition, we defined the class of plaintiff landowners in W-3009 and W-3159. As to each class, we found that the class was so numerous that joinder of all members was impracticable, that there were questions of law or fact common to each class, that the claims and defenses of the representative parties in each class were typical of the claims and defenses of the class, that the representative parties would fairly and adequately protect the interests of the class.

We found further as to each class that the further prerequisites of Rule 23(b) (1) (A) and (B) were met, in that prosecution of separate actions by or against individual members of the class would create a risk of:

> "(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing, the class, [and]
> "(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; . . ."

A separate finding was made as to the class of lessee-producers in KC-1980, on the ground that claims by and against members of that class met the prerequisite of Rule

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[46] Dkt. 1135, KC-1969.

23(b) (3), in that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[49] We adopt these findings herein.

In our view, these actions are eminently suited to class proceedings. There are estimated to be approximately 30,000 persons who receive income from the production of helium-bearing natural gas from which helium is extracted, by virtue of ownership of land, mineral interest, and/or royalty or other interests. These cases have required lengthy, extensive and costly discovery proceedings, the expenditure of many hours in legal research, assembly and preparation of exhibits, numerous pretrial appearances, in addition to the conduct of a forty-three day trial. [Counsel for landowners state that their expenditures to date exceed $90,000.] To require thousands of individual landowners to present their claims to the fund individually would encumber these interpleader actions with procedural and other complexities of perhaps unmanageable proportions. Likewise, in cases W-3009 and W-3159, the class proceeding permits the economical and expeditious resolution of many claims in one proceeding. As stated in *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 255 (2nd Cir. 1968):

> "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." 391 F. 2d at 560.

Likewise, the lessee-producers are very numerous. Each interpleading pipeline it is estimated has several hundred gas purchase contracts in the area. Joinder of vendors

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[49] Dkt. 66, KC-1980.

under all these contracts would be impracticable and unnecessary.

Cities takes the position that the landowner representatives cannot adequately represent the entire class of landowners, because of alleged conflicting and antagonistic interests between two subgroups of the class, those whose recovery depends entirely upon a determination that helium is "gas" within the terms of mineral conveyances, oil and gas leases, unitization agreements and like documents, and those whose recovery would be enhanced by a determination that helium is *not* "gas" within the terms of such documents.

Certain lessee-producers argue that the landowner class cannot sue or be sued as a class unless they are divided into seven sub-classes as authorized by Rule 23(c) (4).[50]

Of the recited sub-classes, five claim in common that leases do *not* cover helium. Within those five sub-classes, there is no antagonism or conflict of interest between those who may claim all or only a proportionate share of helium or the proceeds from its sale. Lessee-producers envision two sub-classes as claiming that leases *do* cover helium, and claiming in addition that lessee-producer gas purchase contracts provide no payment for helium contained in natural gas delivered thereunder. We would point out that these two sub-classes would also recover if leases were found *not* to cover helium. We fail to perceive any antagonism or conflict of interest among the sub-classes with respect to the issues here involved.

Landowners in pleading and presenting their case have sought recovery on alternative propositions: One, that the leases *do not* covey helium; the other, that they do; but the landowners have not been paid therefor. The Court remains convinced that there is no occasion to create seven sub-classes among landowners to present separately, two

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[50] See, e.g., Dkt. 1047, KC-1969.

alternative and mutually exclusive theories, which have both been most ably investigated, pleaded and tried by counsel in behalf of the land owner class.

In Cases W-3009 and W-3159, the United States denies that "all owners of lands or mineral interests from which helium-bearing natural gas is produced which is the subject matter of this action comprise a class which can be represented by the named plaintiffs (Landowners) in this action."[51] The United States does not specify in what particular respects the representative parties, or their counsel, fail to represent adequately the absent members of the class, or in what respect their claims and defenses are not typical of those absent persons. For the reasons stated supra in this section, we remain of the view that the claims of representative landowners are typical of those of absent members, that they raise questions of fact and law common to the class, and that the representative parties have fully represented and protected the interests of the entire class.

Lessee-producers have renewed objections to orders of the court, all entered prior to July 1, 1966, finding that landowners constituted a "true" class in each of the interpleader cases.[52] Rule 23 as amended became effective July 1, 1966, and was applied to all pending cases in subsequent class rulings. However, the order of January 16, 1967, in which the classes were defined, provided that "classes previously defined by the court in regard to claims of . . . Northern Natural Gas Company and Northern Helex Company in KC-1969 and claims of third-party plaintiff Panhandle Eastern Pipe Line Company in KC-1980 are not affected by this order." The class of landowner defendants in KC-1980 was previously denominated a "true" class.[53] This categorization was important under the

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[51] Pre-Trial Order, W-3009, W-3159, p. 13, ¶ 2 of each case.

[52] Dkt. Nos. 535-538, 649, KC-1969.

[53] Dkt. 649, KC-1969.

old rule principally for identifying persons bound by the judgment, and helping in turn to determine the res judicata effect of the judgment if questioned in a later action. See Notes of Advisory Committee on Rule 23. We determine that the extent of the judgment in this case is to be governed under Rule 23 as amended. These objections are thus mooted.

Lessee-producers object to the court's order that Panhandle's third-party complaint in KC-1980 be maintained against them both individually and as representatives of a class of approximately 540 producers who sell natural gas to Panhandle which is processed for helium extraction. Maintenance of this complaint against the third-party defendants as a class was ordered under Rule 23(b) (3), for which the court made the requisite finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[54] Accordingly, the court directed notice be given to absent members of the class.

Rule 23(b) (3) recites four "non-exhaustive factors" to be considered in authorizing a class proceeding under that subsection:

> "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

At no time prior to trial did it appear that any individual member of the class had any interest in exercising separ-

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[54] Dkt. 66, KC-1980; See Motion, Dkt. 58, KC-1980.

ate control over the prosecution or defense of any claim, that any prior litigation existed between Panhandle and any member of the lessee-producer class respecting the issues raised in the third-party complaint, that it was not desirable and in the interest of expedition and economy of litigation to concentrate litigation of Panhandle's claims against all its gas vendors in one particular forum, or that a class proceeding would occasion any special difficulties. Moreover, it was clear that questions of law and fact common to members of that class predominated over questions affecting only individual members, and that permitting maintenance of the claims of Panhandle's gas vendors to the fund in the interpleader action was superior to any other available method for the fair and efficient adjudication of the lessee-producers' claims to that fund in KC-1980. After trial, with the benefit of hindsight, the court remains convinced of the correctness of the order regarding the class of lessee-producers in KC-1980, and we decline to disturb it.

We find that the representation of the interests of both classes is fully adequate, on at least two grounds. First the representation by counsel for both the landowner and lessee-producer classes has been of the highest quality. Their presentation reflected diligent, careful, and incisive attention to the interests of the class. In addition to the most careful investigation by deposition, interrogatories and other discovery of facts, they have explored fully, in evidence, briefs and arguments, what must surely be every conceivable theory which the facts could possibly support.

Secondly, the very number of representative parties is substantial. There are over 200 named landowner claimants in KC-1945; seven in KC-1946; six in KC-1947; 45 in KC-1948; over 500 in KC-1969, and over 300 in KC-1980, in addition to those named in W-3009 and W-3159, some of whom appear in the interpleader cases, also. Thus, in toto, over one thousand landowners advanced claims in

their own behalf and that of others similarly situated in all these consolidated cases.

Lastly, we turn to the question of notice to the members of the landowners and lessee-producer classes to whom the court has not yet directed notice to be given, which includes all except the lessee-producer class in KC-1980. In our order filed January 16, 1967,[55] the court found that the claims of all the classes met the requirements of Rule 23(b) (1)(A) and (B), and that accordingly notice to absent members of those classes was not required at that stage of the case, prior to trial on the issues of liability alone. This holding was based on the view that notice to absent members was required only when the class proceeding was founded upon Rule 23(b)(3).

Subsection (c)(2) provides as follows:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Absent requirement of notice in class proceedings under Rule 23(b) (1) and (2), we regarded notice as mandatory only for class proceedings under 23(b) (3). The Court of Appeals for the Second Circuit in May, 1968, addressed itself to this point, thus:

> "We must also note that plaintiff's effort to qualify the action under 23(b) (1) and 23(b) (2) was induced by his erroneous theory that notice is not 'mandatory'

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[55] Dkt. 1135, KC-1969.

> under these sections. This theory is based on the assumption that 23(c) (2) provides the only 'mandatory' notice required by the new rule. Since this particular section refers exclusively to actions brought under 23(b) (3), other suits cognizable under either 23(b) (1) or 23(b) (2) would only be subject to 'discretionary' notice under 23(d) (2). Nevertheless, we hold that notice is required as a matter of due process in all representative actions, and 23(c) (2) merely requires a particularized form of notice in 23(b) (3) actions. . . ." *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 at 564-565 (2nd Cir. 1968) [Footnotes and citations omitted.]

We think that the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties. As stated in *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

> "The Supreme Court has indicated that adequacy of representation, not form of notice, is the crucial consideration. See *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S. Ct. 115, 118, 85 L.Ed.22 (1940) ('this Court is justified in saying that there has been a failure of due process *only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.*'" [*Emphasis by the court.*] 43 F.R.D. at 500.

We cannot, of course, determine the res judicata effect of the judgment entered herein, but we deem in the public interest that the extent of the judgment be as broad as constitutionally permissible. We think this interest will be best served by directing that "the best notice practicable under the circumstances" be given all members of the class of landowners and lessee-producers, prior to entry of judgment, apprising them of the extent of the proposed judgment and providing any member thereof adequate time to signify his dissatisfaction with the adequacy of representation of his interest, and to advance any new

claim to the interpleader fund, or against the United States which arises out of his status as a member of the described class and which has not been adjudicated herein.

The present view of the Court, is that the best notice practicable includes individual notice to all members of each class, and that this can be accomplished with "reasonable effort."

JURISDICTION

The basic jurisdiction of the Court is premised upon 28 U.S.C. Section 1335; 1397 and 2361.

Jurisdiction of the six interpleader cases is founded upon 28 U.S.C. Section 1335, which provides as follows:

> "(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation . . . having in . . . its custody or possession money or property of the value of $500 or more, . . . or being under any obligation written or unwritten to the amount of $500 or more, if
>
> (1) Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.
>
> (b) Such an action may be entertained although the titles or claims of the conflicting claimants do not

> have a common origin, or are not identical, but are adverse to and independent of one another."

In *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 18 L.Ed. 2d 270, 87 S.Ct. 1199 (1967), the Court established the principle that in interpleader actions under § 1335, only "minimal diversity" is required, that is, diversity of citizenship between any two adverse claimants. Such diversity exists in these cases.

By the terms of the above statute, jurisdiction is dependent upon deposit of the money or property in court by the interpleading party, or else the giving of bond "with such surety as the court or judge may deem proper." *Farmers Elevator Mutual Insurance Company v. Jewett*, 394 F.2d 896 (10th Cir. 1968).

In KC-1945, Cities Service Gas has given bond in the sum of $16,000, with proper surety,[56] and Cities Service Helex gave like bond upon entry into the case.[57] Cities Service Helium (now Cryogenics), joined as an involuntary plaintiff, filed no bond, so far as appears. In KC-1946, -1947, 1948, Cities Service Gas and Cities Service Helex each filed the following respective bonds: $15,000;[58] $12,000;[59] $32,000.[60] In KC-1969, Northern Natural Gas and Northern Helex jointly filed a bond, with surety, of $100,000.[61] In KC-1980, National Helium filed bond with surety of $100,000. Ashland Oil & Refining Company moved December 15, 1966, to enlarge the bonds in cases KC-1947, -1969, and -1980, to not less than $75,000,000, $75,000,000, and $110,000,000, respectively,[62] these sums based on mo-

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[56] Dkt. 5, KC-1945.

[57] Dkt. 48, KC-1945.

[58] Dkts. 5, 37, KC-1946.

[59] Dkts. 5, 39, KC-1947.

[60] Dkts. 5, 58, KC-1948.

[61] Dkt. 5, KC-1969.

[62] Dkt. 1095, KC-1969.

vant's estimates that during a period of six years projected to elapse from the commencement of helium extraction operations and sales by the interpleading plaintiffs in those cases until judgment herein, proceeds by the plaintiffs would total approximately $64,000,000, $67,000,000, and $107,000,000, respectively. After argument, the motion was withdrawn.[63] Shortly thereafter, counsel for Cities Service Gas Company filed an order reciting a statement and agreement made in open court that "Cities Service Gas Company would be responsible for and would pay and satisfy any final money judgment against Cities Service Helex, Inc., or Cities Service Cryogenics, Inc., in this action which is not otherwise paid or satisfied," the captioned case being KC-1946 only.[64]

The Interpleaded Funds.

It has been generally agreed since the commencement of these cases that the funds involved consisted of the proceeds from the sale of helium. The interpleading plaintiffs have been and presently are making sales of helium only to the United States.

The Court finds that in cases KC-1945 through KC-1948, the fund consists of all proceeds received and to be received by Cities Service Helex, Inc., from the United States as payment for helium contained in a helium-gas mixture delivered to the United States pursuant to that contract between the United States and Cities Service Helex, Inc., executed August 22, 1961. Stated otherwise, the subject matter of these four cases consists of the obligation of Cities Service Helex, Inc., to pay the proceeds received by it from the sale of helium to the United States or to any other purchaser, to any person found to be the owner of such helium, or to be otherwise entitled to participate in such proceeds.

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[63] Dkt. 1137, KC-1969.

[64] Dkt. 1139, KC-1969.

The Court further finds that the fund interpleaded in KC-1969 consists of all proceeds received or to be received by Northern Helex, Inc. (formerly Helex, Inc.) as payment for helium contained in a helium-gas mixture delivered to the United States under that contract between the United States and Helex, Inc., dated August 15, 1961. Stated otherwise, the subject matter of the action consists of the obligation of Northern Helex, Inc., to pay the proceeds received by it for the sale of helium to the United States, or to any other purchaser, to any person found to be the owner of such helium, or to be otherwise entitled to participate in such proceeds.

The Court further finds that the fund interpleaded in KC-1980 consists of all proceeds received and to be received by National Helium Corporation from the United States as payment for helium contained in a helium-gas mixture delivered to the United States under a contract executed October 18, 1961. Again, stated more broadly, the subject matter of the action consists of the obligation of National Helium to pay the proceeds received by it as payment for helium sold to the United States or to any other purchaser, to any person found to be the owner of such helium, or to be otherwise entitled to share in the proceeds of its sale.

The foregoing funds were not those initially interpleaded by plaintiffs in the Cities cases and in KC-1980. The landowners moved to dismiss all six interpleader actions for want of jurisdiction, arguing, inter alia, that the funds before the Court did not include the amounts received by the interpleading plaintiffs from the sale of helium to the United States. The Court overruled this motion, stating that the "subject matter in controversy as contemplated by the interpleader statute is the claim of ownership under the mineral leases of the helium produced and marketed." This ruling was affirmed in *Grounds v. Northern Natural Gas Co.*, 327 F.2d 1003 (10th Cir. 1964) (per curiam).

Subsequent to this ruling, the subject fund was more precisely defined and enlarged. By order filed January 10, 1967, the fund in the Cities cases (KC-1945, -1948) was defined thus:

> "Counsel for plaintiffs [the Cities group] states that the interpleaded fund involved in such four law suits, is the proceeds from the sale of all . . . the helium which has been or is being extracted by Cities Service Helex, Inc."[65]

In KC-1980, plaintiff National Helium interpleaded at the outset only its obligation to pay to Panhandle $2.06 per Mcf for helium extracted from the gas stream belonging to Panhandle. It did not interplead the monies received for its sale to the United States. In the commencement of that action, however, National Helium sought and obtained an injunction against further prosecution of a declaratory judgment action in an Oklahoma state court, in which plaintiffs sought a determination that they were the owners of and entitled to the net value of all helium sold by National Helium to the United States, thus putting in issue in that state court case the right to entire payments for helium received by National Helium for helium sales to the United States. The discrepancy between the scope of the two cases was raised at a hearing April 20, 1964, after the Tenth Circuit ruling supra. Counsel for National Helium then stated that "if the pleading (in KC-1980) is not as broad as the pleading in the State Court so that the issues are not the same, that we will make them the same." Counsel stated further at that hearing:

> "Your Honor, what I have been trying to say was that in the National Helium case, at least, we look upon the liability of National Helium as the value of the helium, whatever it may be, more or less. I mean it might be more than eleven dollars. It might be less.

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[65] Dkt. 1114, KC-1969.

> We accept the liability of National Helium for the value of the helium and that ought to clear the air as far as National Helium goes."[66]

Although examination of the files discloses no amendment of the pleadings, we cannot but conclude from the foregoing that the interpleaded fund in KC-1980 is as we have determined it to be.

Jurisdiction of Landowners' Cross-Claims.

The landowners' claim to the fund rests on one of two theories; first, that oil and gas leases in which they hold interests and under which natural gas is produced do not convey helium as a constituent of the "gas" leased thereunder, and secondly, that the helex companies are unjustly enriched by monies received by them from the sale of helium.

In addition to their claims against the fund, however, landowners have asserted cross-claims against the lessee-producers, the assertion of which is contingent upon a finding that landowners have no interest in the interpleaded funds themselves. Landowners urge that if the leases do cover helium, first that they have not been paid the proper royalties therefor under the fractional royalty provisions of the leases, and are entitled to recover royalties based upon the fair and reasonable value of helium as attained by reason of its severence from the stream and subsequent marketing; alternatively, landowners urge that the lessee-producers have failed to market helium produced under such leases with reasonable diligence, and seek cancellation of the leases as to the helium portion of the gas stream.

Rule 13(g) F.R. Civ.P. provides thus:

> "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the

[66] Tr. 10:780-781.

> transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

Lessee-producers urge that these cross-claims do not relate to the "property that is the subject matter of the action," the proceeds received by the plaintiffs from the sale of helium, that these claims are not ancillary to the interpleader subject matter, that in fact, they are alternative claims not against the fund nor the holders thereof, but against co-claimants founded upon independent contracts, the leases, recovery upon which claims would leave the interpleaded funds intact, and would further require, the granting of in personam judgments against the lessee-producers, which is beyond the jurisdiction of the court in statutory interpleader actions.

In *Knoll v. Socony Mobil Oil Company*, 369 F.2nd 425 (10th Cir. 1966), *cert. denied*, 386 U.S. 977, 18 L.Ed.2d 138, 87 S.Ct. 1173 (1967), the Court stated thus:

> "A related jurisdictional issue is whether the trial court erred in enjoining appellants from asserting any title in or to the 'above described property' in any manner inconsistent with the terms of its order and judgment. This was an *in personam* exercise of jurisdiction. In an interpleader action, however, *in personam* jurisdiction extends only to the fund deposited with the court. Since the trial court was limited to disposition of the *res*, we must hold that the court lacked jurisdiction to enter this order." 369 F.2d at 429.

The fund before the Court in that case was the money held by Mobil and owing to the true owners of certain property and lease-hold rights therein, from which it had

produced oil. The injunction extended beyond the *res*, precluding claimants from asserting any title in the realty itself.

In *Erie Bank v. United States District Court for the District of Colorado*, 362 F.2d 539 (10th Cir. 1966), the Court held that in an interpleader action in which the plaintiff asserted no claim to the deposited fund, it lacked jurisdiction over a counterclaim by a claimant against the disinterested stakeholder on the ground that the latter was not an "opposing party" within Rule 13. It would appear to follow that when the stakeholder was himself an interested party, a counterclaim would be not only permissible under Rule 13, but compulsory thereunder, and the Court would be empowered to enter judgment on such counterclaim.

As to landowners' cross-claims, however, for additional royalties on helium or on the value of natural gas as allegedly enhanced by the presence of helium, and for cancellation of leases as to helium for failure to market same, we must agree with the lessee-producers that those claims do not relate to the subject matter of the action. It is true that landowners' claims are founded upon the identical leases upon which lessee-producers base, in important part, their claims to the fund. In interpleader actions, however, the "subject matter of the action" is not a set of facts, a transaction or other occurrence which gives rise to litigation, but a specific identified fund or property. Claims must not only "relate" to that property, but be asserted against it, as we view the present law of this Circuit.

This is a type of case of which the Supreme Court spoke in *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 18 L.ed.2nd 270, 87 S.Ct. 1199 (1967), "where a stakeholder, faced with rival claims to the fund itself, acknowledges—or denies—his liability to one or the other of the

claimants. In this situation, the fund itself is the target of the claimants. *It marks the outer limits of the controvery.*" 386 U.S. at 534, 18 L.Ed.2d at 277. [Emphasis supplied.] [Footnote omitted.] We therefore lack jurisdiction over the landowners' cross-claims against their lessee-producers.

Jurisdiction of Pipeline Counterclaims.

The lessee-producers claim the fund on the ground that helium, a non-combustible and non-hydrocarbon component of the gas stream, did not pass to the pipeline companies under the gas purchase contracts between the parties. Accordingly, the pipeline companies, Cities Service Gas, Northern Natural and Panhandle have asserted counterclaims against the lessee-producers on their warranties of title in contracts with pipeline companies contingent upon the recovery by the producers of the funds.

These claims are twofold: First, it is asserted that warranties of title in the parties' gas purchase contracts extend to the full gas stream, and that if only the hydrocarbon portion passed thereunder, the lessee-producers must respond to the purchasers for breach of warranty respecting the balance of the stream. Alternatively, pipeline companies seek recovery from each of the lessee-producers of that percentage of all payments made under the gas purchase contracts which the volume of non-combustible constituents including helium bears to the volume of the total stream.

These counterclaims are founded upon the identical gas purchase contracts under which the lessee-producers claim the fund. They arise out of the "transaction . . . that is the subject matter of the opposing party's claim," or they relate to property that is the subject matter of the original action. We conclude that these counterclaims are permissible under Rule 13, insofar as they affect the rights of the parties to participate in the fund.

Jurisdiction of Claims Asserted Against the United States.

An additional jurisdictional problem is raised in the actions by landowners against the United States. The United States denies first that the landowners constitute a class, a question we have heretofore disposed of,[67] and contends further that the United States is not subject to suit by a class. In each of these cases, the landowners assert two separate claims against the government. First, they assert ownership of the helium being delivered to the United States by each of the helium extracting companies, and urge that the United States has appropriated and converted helium so delivered to its own use, and must respond to plaintiffs for the fair, just and reasonable value of same. Jurisdiction for this claim under the Tort Claims Act is asserted under 28 U.S.C. § 1346(b), which confers upon the district courts exclusive jurisdiction of:

> "civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal inqury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Plaintiffs' second claim commingles theories of third-party beneficiary rights and reverse condemnation. It is alleged that the United States has acquired possession of the helium-gas mixture received from its vendors by the exercise of its power of eminent domain, and further that the contracts under which the United States purchases helium provide for payment therefor to the owners thereof, and that as such owners, the plaintiffs are third-party beneficiaries thereof. Jurisdiction for this second claim

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[67] Page 21, supra, (Class Actions).

under the Tucker Act is asserted under 28 U.S.C. § 1346(a)(2), which confers upon the district courts, concurrent with the Court of Claims, jurisdiction over the following cases:

> "(2) Any other civil action [other than enumerated tax-related actions] or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Although landowners alleged that no individual claim may exceed $10,000, they have stipulated that claims of some individuals exceed that sum.[68]

The defendant United States asserts that the United States is not liable to suit by a class without its consent, that since neither § 1346(b) or § 1346(a)(2) makes express provision for suit by a class, no such consent has been given. The government invokes the principle that statutory waivers of sovereign immunity are strictly construed, that waivers are not lightly implied, and that no justification exists for implying such a waiver in favor of a class of plaintiffs, most of whom are not identified.

It is further argued that under the Tucker Act,[68a] and its predecessor statutes dating back to 1855, no court has granted relief in a class action against the government, and that neither the Tucker Act nor the Tort Claims Act adopted in 1946 has been amended by Congress to provide for such proceedings. Defendant further complains of the burden falling upon the government by the difficulties of payment of judgments in favor of a large class of plaintiffs, many of whom are not now identified. Payment of

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[68] Dkt. 527, KC-1969; See Government's Brief, Dkt. 892, KC-1969; Dkt. No. 59, W-3009.

[68a] Act of March 3, 1887, c. 359, 24 Stat. 505.

persons holding judgments against the United States rendered in the district courts is authorized in 28 U.S.C. § 2414, payments to be made on settlements by the General Accounting Office upon certification by the Attorney General that the judgment is final, that is, that no appeal will be taken therefrom or that no further review will be sought of a decision affirming the same. This burden does not seem substantial. Rule 23 requires that "[t]he judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), [the instant case] whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class."

Notwithstanding that Rule 1, F.R.Civ.P., provides that "[t]hese rules govern the procedure in the United States district courts in *all* suits of a civil nature . . . with the exceptions stated in Rule 81," (none of which apply) [Emphasis supplied.] it is argued that absent an express consent to suit by a class, no jurisdiction exists, and that under Rule 82, the rules "shall not be construed to extend . . . the jurisdiction of the United States district courts." In *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941), the Court stated:

> "The jurisdiction thus limited [by the Tucker Act] is unaffected by the Rules of Civil Procedure which prescribe the methods by which the jurisdiction of the federal courts is to be exercised, but do not enlarge the jurisdiction." 312 U.S. at 591, 85 L.Ed. at 1064.

The Court stated further that the Tucker Act "must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted." 312 U.S. at 590, 85 L.Ed. at 1063.

The Court again addressed itself to the canon of strict construction in *United States v. Yellow Cab Co.*, 340 U.S. 543, 95 L.Ed. 523, 71 S.Ct. 399 (1951), where it stated, quoting *United States v. Aetna Cas. & Surety Co.*, 338 U.S.

366, 383, 94 L.Ed. 171, 186, 70 S.Ct. 207, 12 A.L.R. 2d 444 (1949):

> "'In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 NE 28, 29-30: "The exemption of the sovereign from suit involved hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."'" 340 U.S. at 554, 95 L.Ed. at 532.

In *Capital Transit Co. v. United States*, companion case to and decided with *Yellow Cab, supra*, the defendant sought to implead the United States as a third-party defendant, as a joint tortfeasor obligated to contribute to any judgment ultimately won by the plaintiff. The lower court dismissed the third-party complaint, holding it barred on the ground that no consent to such suit had been given. The Court reversed, holding that, having decided in the companion case that the government could be sued for contribution in an independent action, such right could be enforced by way of third-party complaint, and that the third-party practice provided for by Rule 14 was applicable to suits against the United States. In *United States v. Muniz*, 374 U.S. 150, 166, 10 L.Ed.2d 805, 817, 83 S.Ct. 1850 (1963), the Court reaffirmed its holding in *Rayonier, Inc. v. United States* 352 U.S. 315, 1 L.Ed. 2d 354, 77 S.Ct. 374, that "'[t]here is no justification . . . to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it'". The rule of strict construction is not one of narrow construction. The prevailing trend of decision is canvassed in *City of Pittsburgh v. United States*, 359 F.2d 564 (3d Cir. 1966):

> "Although at one time the doctrine of sovereign immunity had such vitality that a waiver of it was

> strictly construed (See *United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)), the purpose of the Federal Tort Claims Act to permit those injured by the negligence of employees of the United States to recover damages to the same extent as if the United States were a private person expresses so strong a public policy that the statute has been deemed to be highly remedial and has received a liberal construction. [Citations omitted.] This overriding purpose, expressed in the statute, has provided the guide to the interpretation of the Act, and it has been applied in some circumstances where its literal language might have resulted in a restricted meaning . . . [T]he view has ultimately prevailed that the United States may be sued by a subrogee of the injured party, by an indemnitee who has paid the injured party's claim, and that it may be joined originally with other defendants as a joint tort-feasor, and may also be impleaded as a third-party defendant to enforce contribution against it as a joint tort-feasor." 359 F.2d at 567. [Footnotes omitted.]

Strictly speaking, the permissibility of a class action under the Tort Claims Act does not require construction of the language of the Act, for it is silent on the question. In substance, the government asks the Court not to construe the Act strictly or narrowly, but to create a judicial exemption from it. Neither the plaintiff nor defendant have pointed to any real increased procedural burden upon the government resulting from the defense of a class action.

Given the remedial purpose of the Tort Claims Act, and indeed of the Tucker Act, the application of Rule 23 to actions thereunder against the United States seems particularly appropriate. As stated in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2nd Cir. 1968):

> "Class actions serve as important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small

> claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." 391 F.2d at 560.

Quoting academic commentary on the device, the court in *Dolgow v. Anderson,* 43 F.R.D. 472 at 484 (E.D.N.Y. 1968) noted that the class action is "particularly appropriate where those who have allegedly been injured 'are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.'" The instant cases are excellent examples, where only an exceptionally circumstanced landowner could afford the lengthy, extensive and costly preparation and litigation involved.

Given the silence of either the Tucker Act or the Tort Claims Act on the propriety of class proceedings, the absence of any apparent substantial burdens sustained by the government in defending such actions, the economy of litigation achieved thereby, and the enhanced access of small claimants to legal redress against the government, we hold that jurisdiction does not fail under 28 U.S.C. § 1346(a) (2) and (b) because plaintiffs have sued as a class.

One question remains concerning jurisdiction under the Tucker Act, which confers jurisdiction over a "civil action or claim against the United States, not exceeding $10,000 in amount, . . ." If the stated jurisdictional limit for actions against the United States in the district courts under the Tucker Act applies to the entire sum sought to be recovered from the government in the action, then jurisdiction for plaintiffs' claim under the Tucker Act lies only in the Court of Claims. If the jurisdictional monetary limit applies only to the claim of each individual plaintiff, we have jursdiction of all claims not exceeding $10,000. No authority is cited on this issue, and independent research discloses none. We hold for the reasons set forth above

that the jurisdictional monetary limit applies to the claim of each member of the class and we therefore have jurisdiction over the claims not exceeding $10,000 asserted under the Tucker Act.

As indicated, supra, plaintiffs have commingled two theories in their claim under the Tucker Act, claiming standing thereunder first as third-party beneficiaries of the contracts of the United States with each of the helium extraction companies, and secondly, as owners of property acquired by the government by exercise of its powers of eminent domain without paying just compensation therefor.

Each of the contracts upon which plaintiffs rely provides that if the vendor of helium is required to make payments to other persons for helium extracted by them and sold to the United States, or for the acquisition of helium in natural gas, the United States will reimburse each for such amounts, with the companies themselves bearing approximately the first $3.00 per Mcf of the costs of such reimbursement. The obligation of the United States runs only to its contractors, and payments are required to be made only to such companies in the amount those companies themselves have paid, less approximately $3.00 per Mcf. Payments by the United States to any one of its contractors under these reimbursement provisions is triggered, as it were by first, a determination of the company's liability to persons found to be entitled to such compensation for the helium, and secondly, by actual payment therefor. The need for adjudication of liability may be waived by the United States, by consenting to such payments. Once these conditions are met, the obligation of the United States runs only to its contractors. The entire scheme of the contracts precludes the direct action against the United States.

A mere promise to indemnify against damages does not constitute a contract for the benefit of third persons which

a party claiming damages may enforce directly against the indemnitor, "Here the promisor's liability does not arise until the promisee has suffered loss or expense. Until then the promisee has no right of action, and consequently one claiming damages can assert no derivative right against the promisor, much less a direct right." 2 Williston on Contracts § 403 (3rd ed.) "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." Restatement of Contracts, § 147.

We conclude that plaintiff landowners are but incidental third-party beneficiaries, and as such lack standing to maintain their Tucker Act claim on this ground.

The balance of their claim thereunder must be founded "upon the Constitution, or any Act of Congress, or any regulation of an executive department . . ." Plaintiffs allege that the government's acquisition of helium constitutes an exercise of its powers of eminent domain. "When the United States takes property for public use and without just compensation as required by the Fifth Amendment, the owner may sue under the Tucker Act." *United States v. Wald,* 330 F.2d 871 at 872 (10th Cir. 1964). An actual taking must be established. Once found, the suit becomes in effect a condemnation action in reverse. Landowners must establish such a taking, as a jurisdictional prerequisite to maintenance of their Tucker Act claim, or the same must be dismissed for want of jurisdiction.

The Geographical Area

The helium giving rise to the funds in these interpleader cases and the suits against the United Sattes is contained in natural gas produced from an area denominated the Hugoton Gas Area, which lies in parts of three states, Texas, Kansas, and Oklahoma.[69] The area covers approx-

[69] There is some contention that parts of Colorado comprise the Hugoton Area or Field. If so, we have no indication of Colorado gas wells being involved in these proceedings.

imately 210 miles from north to south, 160 miles from east to west, and covers approximately 33,000 square miles and over 21 million acres. The area comprises six principal gas fields. The Kansas Hugoton Field lies in eleven Kansas counties in the southwestern part of the state: Hamilton, Kearny, Finney, Gray, Haskell, Grant, Stanton, Morton, Stevens, Seward and Meade. The Guymon Hugoton Field lies in Texas, Beaver, and Cimarron counties in Oklahoma. The Texas Hugoton and East and West Panhandle Fields lie almost wholly in the northernmost three tiers of counties, twelve in all, of the Texas Panhandle.[70]

Fields within this geographical area from which natural gas is produced but not processed for helium extraction by interpleading plaintiffs, include, among others, the Cliffside Field in Texas, the Keyes Field in Oklahoma, and the Greenwood Field in Kansas.

The gas underlying the geographical area outlined above contains approximately fifteen per cent of the known natural gas reserves of the United States. It is, according to some testimony, the largest single pressure-connected gas reservoir in the world. It serves approximately fifteen million domestic and industrial consumers. Most important for this litigation, these fields were estimated, as of the mid-1950's, to contain ninety-nine per cent of the economically recoverable helium in the United States, totalling approximately 119 billion cubic feet of helium from estimated resources of a total of 36.4 trillion cubic feet of gas.[71]

Commercial gas production of natural gas from the Hugoton fields began a half century ago with the completion of the first well, located in the Texas Panhandle, in

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[70] LOX 791; Helex Ex. 36 (See Maps).

[71] LPX 53, p. 1; LPX 56, p. 10.

1918.[72] The first gas well in Kansas Hugoton was completed in 1922, near Liberal, and the discovery well of the Guymon Hugoton (Oklahoma) was completed in 1922. The generally-regarded discovery well of the Kansas Hugoton was completed in 1927.[73] Development of the fields in terms of wells completed was relatively slow until the late 1920's and early 1930's, when pipelines were first extended into the area, thus making accessible widespread industrial and consumer markets.[74] Development accelerated after World War II, with the further expansion of pipelines through the area, to transport gas to more widespread fuel markets. The geographical productive limits of the fields expanded gradually until in 1941, the Kansas Corporation Commission first defined the limits of the Kansas Hugoton Field.[75] The Guymon Hugoton Field was first defined by the Oklahoma Corporation Commission in 1945.[76] The Texas Panhandle Fields, East and West, developed earlier, and not until 1945 did the number of wells in the Hugoton Fields of Texas, Oklahoma and Kansas equal those in the Panhandle Field.[77] From the completion of the first well in 1918 through 1965, more than 15,000 gas wells were drilled in this area.

The development of these fields is reflected in the incidence of leasing activity, which show that over 85 per cent of the leases outstanding in Kansas were taken since 1940; that over 75 per cent of the Oklahoma leases were taken after 1940; and that in Texas, where drilling and leasing activity commenced earlier, 65 per cent of the outstanding leases canvassed were taken in 1941 and there-

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[72] Gensch Tr. 2:128.

[73] Gensch Tr. 2:130.

[74] Helex Ex. 37.

[75] LOX 791; Gensch Tr. 2:151-152.

[76] Gensch Tr. 2:151-153.

[77] Tr. 46:4484.

after.[78] Wells were drilling in the Hugoton gas area as follows:

CUMULATIVE TOTAL WELLS

	Panhandle Field	*Hugoton*		
		Kan.	*Okla.*	*Texas*
1924	29	1	—	—
1929	444	8	3	4
1934	856	142	8	4
1939	1435	282	28	6
1944	1763	403	172	16
1949	2338	1848	760	367
1954	3010	3317	1339	838
1959	3841	3891	1378	932[79]

HELIUM AND NATURAL GAS

The presence of helium in natural gas was first discovered in 1905, by two University of Kansas professors, Cady and McFarland, who analyzed a sample from a gas well at Dexter, Kansas, drilled and completed in 1903, and discovered it to contain 1.84 per cent helium, with minute quantities of two other inert gases, neon and argon. This gas had a relatively low British thermal unit (Btu)[80] content, under 500 Btu, and was a relatively inefficient fuel gas.

Helium is contained, in either measurable or detectable quantities, in gas found in the majority of natural gas fields in the United States. In 1918, the Bureau of Mines commenced a program of gas analyses of samples collected from fields over the nation. The first report of analyses collected thereunder was published in 1921; that report discloses the presence of helium in either trace or measur-

[78] LOX 794; Tr. 6:428 et seq.

[79] Helex Ex. 37.

[80] The amount of heat required to raise the temperature of one pound of water one degree Fahrenheit at 39.2°F.

able quantities, in virtually all of 183 samples collected from Texas, Oklahoma, and Kansas.[81] Since that time, approximately 5800 gas samples have been analyzed and reported in Bureau of Mines information bulletins and circulars, representing 3,008 gas fields in 33 states in this country from which commercial gas production has been obtained. Over 95 per cent of these samples contained helium in trace or measurable quantities.[82] Of an additional 947 samples subsequently reported, only two contained no helium.[83] Thus, the presence of helium has been detected or measured in natural underground gas reservoirs throughout the greater part of the United States.[84]

The presence of helium in natural gas has not been a secret to which the Bureau of Mines has been the only privy party. Reports of gas analyses conducted by it were furnished the well owners, producers, and other persons providing samples, and commencing in 1928, helium was reported as a separate constituent in those analyses, although prior to that time it had been reported as part of the nitrogen content of gas. As indicated above, the first publication of gas analyses showing the presence of helium was dated 1921, a professional paper numbered 121, titled 'Helium-Bearing Natural Gas,'' by G. Sherburne Rogers.[85] There have been other publications in the United States.[86]

The constituents of natural gas found in underground reservoirs in the Hugoton area include hydrocarbon compounds, ranging from methane, the compouind lightest in

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[81] LOX 6.

[82] Helex Ex. 12.

[83] Helex Ex. 282-283.

[84] Helex Ex. 14.

[85] LPX 6.

[86] Helex Ex. 12.

molecular weight but lowest in Btu yield, through ethane, propane, normal butane, iso-butane, normal pentane, iso-pentane, and various heavier hydrocarbons. Non-hydrocarbon constituents include nitrogen, oxygen, argon, helium, hydrogen sulfide, hydrogen, and carbon dioxide. Gaseous hydrocarbons comprise by volume approximately 85 per cent of the natural gas in the Hugoton fields; the non-hydrocarbon constituents enumerated above comprise the remaining 15 per cent. Helium alone comprises, on the average, about four-tenths of one per cent of Hugoton area gas, by volume.

The composition of gas from separate wells in the Hugoton area is by no means constant. Methane, e.g., ranges from a low of 45.9 per cent to a high of 82.6 per cent; nitrogen from a high of 44.3 per cent to a low of 6.5 per cent. Helium ranges from a low of .22 per cent to .97 per cent of the total stream.[87] No gas exists in the Hugoton reservoirs which does not contain non-hydrocarbon constituents.[88]

The separate constituent components of gas in a given reservoir, and in the Hugoton area, are found in a state of random molecular diffusion; that is, separate molecules of the hydrocarbon compounds and the non-hydrocarbon elements and compounds are randomly mixed within any given pressure-connected reservoir. The diffusion may not be perfect, so that a given field, or a single well with a field, will yield a gas stream of constant and unvarying composition. Helium itself is diffused within the Hugoton area; its rate of diffusion within a single reservoir may vary among separate vertical zones, depending upon its rate of diffusion through horizontal layers of shale separating separate gas zones.[89]

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[87] Helex Ex. 18.

[88] Ibid.

[89] Tr. 42:4216 et seq.

Although found together within the Hugoton Field, and in many gas reservoirs gaseous hydrocarbons and helium originate through separate processes and they may or may not derive from the same physical source beds. Hydrocarbons are generally thought to originate from chemical breakdown and reorganization of organic animal and vegetable materials deposited on the floor of pre-historic oceans overlying the Hugoton area. Helium is thought, according to the prevailing theory, to be radiogenic, that is, to have resulted from the decay or degeneration of uranium into lead, the breakdown yielding helium atoms during the process. The source beds of helium and hydrocarbon gases are frequently identical, although there is no necessary relationship between the two. The presence of helium and gaseous hydrocarbons within the same reservoir results from their property as gases to migrate through or into porous and permeable subterranean formations.[90]

Helium has never been produced from a gas well separately and apart from the total stream of raw natural gas as it emerges from the wellhead. Other than the removal of liquefiable hydrocarbons through conventional mechanical or low temperature separators, it is economically impossible to separate the constituents of the gas stream at the wellhead, and no practical or economically feasible means has been devised to date for the wellhead separation of helium from the balance of the gas stream. Thus, the composition of the natural gas stream as it is produced at the wellhead necessarily reflects the composition of the reservoir gas.[91]

The production of natural gas from underground reservoirs is accomplished by reservoir pressure, specifically, the difference between reservoir and wellhead pressure causes gas to flow through the well bore. The stream

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[90] Ibid.

[91] Tr. 47:4545.

must necessarily be produced in its entirety, and with all the gaseous constituents randomly commingled in the stream as found in the reservoir.[92]

Helium Extraction Prior to 1960

The only extraction and marketing of helium prior to 1960 except as hereinafter noted was accomplished by the United States. It acted through its Bureau of Mines in the Department of the Interior, which has been charged by statute with helium research and development since 192[illegible]

The first large-volume use for helium was discovered during World War I, (1917-1918) when it was found useful for inflation of lighter-than-air craft, particularly dirigibles. Prior to that War, helium had been extracted from natural gas in only very small amounts, for laboratory purposes. The first large volume extraction was done in two plants built at Fort Worth, Texas, early in 1918, known as Experimental Plants Nos. 1 and 2. A third plant, Experimental Plant No. 3, was completed and started in late 1918, at Petrolia, Texas, approximately 100 miles north of Fort Worth.

The next plant, Production Plant No. 1, was constructed at [illegible]ort Worth, Texas. Each of these plants was constructed by private firms operating under contract with either the Department of the Navy, the Bureau of Mines, or both.

Natural gas for helium extraction was furnished for these plants by the Lone Star Gas Company, a producer of gas from the Petrolia Field and a distributor in Fort Worth.[93]

The next production plant, Production Plant No. 2, was designed and built by the Bureau at Fort Worth, Texas.

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[92] Tr. 37:3719.

[93] LPX 200, 201; Helex 23, Part 1.

Although World War I concluded before helium produced in these plants could be used, production continued at Fort Worth until depletion of the Petrolia Field in 1929.

Faced with approaching depletion of that field, on May 17, 1927, the United States acquired an option for a period of two years to purchase leasehold rights in the Cliffside Field in Potter County, Texas, owned by the Amarillo Oil Company, a producer, pipeline company, and distributor of natural gas in the Amarillo area. Also on that date, the company contracted to sell and deliver natural gas to a helium extraction plant the Bureau intended to construct at Amarillo.[94]

The United States thereafter undertook to acquire both leasehold and retained royalty rights in the Cliffside Field in order to control production therefrom, to avoid pressure to increase production from royalty owners, to be free to shut in production when helium demand decreased in order to avoid the production of any gas not processed for helium extraction. Accordingly, in 1929, the United States exercised its option and began the acquisition of Amarillo's leasehold rights in the field,[95] acquiring the company's gas rights in approximately 26,000 acres of the 50,000 acre field. Leases held by Amarillo were given by W. H. Bush, the Fuqua Land & Cattle Company, and Lee Bivins. The United States acquired the Bush lessor interests by a Gas Grant dated July 19, 1930;[96] the Fuqua Land & Cattle Company interests by contract of sale dated April 17, 1930;[97] the Bivins interests by condemnation proceedings in the United States District Court for the District of Texas, covering "retained gas royalty rights" held by

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[94] LPX 202.

[95] LPX 203.

[96] LPX 11.

[97] LPX 10.

the Bivins heirs.[98] One heir of the Bivins estate claimed that the Bivins gas lease did not convey helium. This claim was rejected by the Commerce Department, and the condemnation of "gas rights" was completed, without mention of helium as a separate constituent of the gas.

By purchase or condemnation, the United States obtained lessors' retained gas in the balance of the field, gas rights to lands not under lease, and fee title to other property in the field, so that by 1933, the United States owned all gas rights in the Cliffside Field. Representative copies of oil and gas leases covering the field contain typical grants of "oil and gas" or "oil and gas, casinghead gas, casinghead gasoline."[99] Helium as such is not mentioned in any of the leases.

The only private firm to extract and market helium as a separate commodity prior to enactment of the Helium Act Amndments of 1960 was the Girdler Corporation. It operated two extraction plants, one at Dexter, Kansas, and one at Thatcher, Colorado (Model Dome). It operated these intermittently between 1927 and 1934. Gas for processing in these plants was supplied by production under leases in the plant vicinity held by Girdler itself.[100] The gas processed at Thatcher was almost wholly non-combustible, containing 85 per cent Nitrogen, seven per cent Helium, and seven per cent Carbon Dioxide. By amendment in 1937, Ch. 895, 50 Stat. 885, to the Helium Act of 1925, Ch. 426, 43 Stat. 1110, the Secretary of the Interior was directed to purchase, if possible, all properties developed or constructed by private parties for helium production prior to passage of the amendment, September 1, 1937. The Girdler plants comprised the only private helium extraction operation in the country at that

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[98] LPX 15.

[99] LPX 216(b).

[100] LPX 216(c)(d).

time, and were purchased by the United States in 1938. They were not at that time in operation, and had not been for approximately four years. The 1937 amendment did not forbid subsequent commercial helium extraction and marketing by private companies. No private firm or corporation undertook these ventures, however, until after the Helium Act Amendments of 1960.

At the commencement of World War II, thus, all helium extraction facilities were owned by the United States, and consisted solely of the Amarillo Plant. It constructed four plants during World War II, to meet the greatly increased helium demand for military requirements. The first was constructed at Exell, Texas, in 1943. Gas for both plant fuel and for helium processing was supplied from the Channing area of the West Panhandle Field under a contract of the United States with the Canadian River Gas Company (merged in 1951 into the Colorado Interstate Gas Company).[101] Wells supplying this production were drilled under a single lease granted by Lee Bivins dated May 1, 1923 covering "Oil and gas" in a 200,000-acre area.[102]

Later in 1943, the United States completed a second plant, at Otis, Kansas. Natural gas was furnished this plant, for both fuel and for helium extraction, from several small area fields under contracts with the Producers Gas Company and Northern Natural Gas Company.[103] Additional supplies of gas were furnished by the Kansas-Nebraska Gas Company under a 1952 contract, supplying gas produced in Barton and Rush Counties, Kansas.[104] The third plant to be constructed was near Cunningham, Kansas, completed in 1944, gas again for both fuel and

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[101] LPX 207.

[102] LPX 216(e).

[103] LPX 208, Helex 27; LPX 209, Helex 26.

[104] LPX 211; Helex 28.

for helium extraction being supplied by the Skelly Oil Company from the Lyons Field.[105] Again, this gas was produced under typical leases of oil and gas.[106]

The last plant built by the United States to meet wartime needs was at Shiprock, New Mexico, known as the Navajo Plant, completed in March, 1944. Helium-bearing natural gas was first furnished this plant from a well named Rattlesnake 1-G, drilled by the Continental Oil Company under a 1923 lease granted by the Navajo Tribe, which conveyed to their original grantor "oil and gas deposits" in the described property and formations. Through a series of agreements,[107] the United States subsequently acquired the lessees' interest as to certain formations under that lease, and became itself a lessee-producer of helium-bearing natural gas under the 1923 lease. This lease was construed in *Navajo Tribe of Indians* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966).[108] This gas contained 7.6 per cent helium, and was non-combustible due to a high nitrogen content.

The Navajo Plant was operated initially for only 18-19 days. Later, operations indicated the Rattlesnake supply was inadequate, and the United States entered into a number of later contracts for helium-bearing gas for processing. By 1955, the Rattlesnake Field having become depleted, the United States contracted with the Stanolind Oil & Gas Company (now Pan American Petroleum Corporation) for gas produced from what is identified as the Hogback Field in San Juan County, New Mexico.[109] It executed the next contract in 1959 with the Pan American

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[105] LPX 210; Helex 29.

[106] LPX 216(g).

[107] LPX 27.

[108] See our discussion *infra*, page 77.

[109] LPX 212; Helex 30.

Petroleum Corporation covering gas produced from the Navajo C-1 well.[110] It executed a gas supply contract for the Navajo Plant in 1962 with the Continental Oil Company, covering gas produced from the Table Mesa Field.[111]

The production of helium reached a wartime high of over 137 million cubic feet in 1944.[112] Immediately after the war, production dropped to approximately 63 million cubic feet in 1946, and later dropped still further to 54 million cubic feet. Accordingly, after the war, all government plants were closed except that at Exell, Texas. Excess production of helium from Exell was first stored in 1945 in the government-owned Cliffside reservoir. The Cunningham Plant was dismantled, and the remainder were placed on standby status.

Helium demand again commenced to increase in 1950, and the government plants at Amarillo, Otis, and Shiprock were placed back in operation in 1950, 1951, and 1953 respectively. By 1952, government production reached and exceeded the previous high of 1944. In 1957, to meet the rising demand, the capacity of the Exell Plant was enlarged from 60 to 240 million cubic feet, and the government thereafter undertook the construction of the last government-owned helium plant, at Keyes, Oklahoma. It was placed in operation in 1959. Gas for this plant was supplied by the Colorado Interstate Gas Company under a contract executed April 4, 1958.[113] It was to be produced from the Keyes Field in Oklahoma.

The contracts recited above comprise all of the gas purchase contracts in this country under which natural gas was purchased by the United States with the express contemplation that helium would be removed from it. No

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[110] Helex 31; LPX 214.

[111] LPX 215; Helex 230.

[112] LPX 112.

[113] LPX 213; Helex 32.

portion of the price to be paid for natural gas was separately and expressly attributed to its helium content until the 1958 Keyes contract. The prices in all contracts prior to 1958 were the prevailing market prices for natural gas for fuel markets at the time of their execution. The Lone Star contracts supplying Experimental Plant No. 3 and Production Plant No. 1 at Fort Worth, Texas provided identical prices, though stated separately, for shrinkage resulting from the removal of helium, and shrinkage resulting from the use of gas for fuel, fifteen cents per Mcf. Contracts executed to supply the wartime plants at Exell, Texas, and at Otis and Cunningham, Kansas, all provided for payment of either seven or eight cents per Mcf for all gas processed and not returned after the extraction of helium. This total shrinkage was composed of not only the helium removed, but gas used for the generation of power and heat, i.e., fuel, hydrogen sulphide removed in the extraction process, and all other gas lost within the plant. Three of the four contracts supplying these plants recited the following respecting the extraction of helium:

> "WHEREAS, the processing of gas for helium extraction tends to improve its composition for use as fuel, because such processing not only removes the greater part of the helium, which has no fuel value, but also removes some portions of other inert gases contained in the helium-bearing gas . . . ."[114]

The 1955 Stanolind contract supplying the Navajo Plant, covering gas from the Hogback Field containing 7.5 per cent helium by volume, provided for payment of twelve cents per Mcf. plus a three cent delivery charge. This gas was not efficient fuel gas, and contained about 450 Btu's.

It was in the 1958 Keyes contract, with Colorado Interstate Gas, that the United States agreed for the first time

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[114] LPX 208, (Example).

to a payment for helium-bearing gas on a basis other than solely for the volume of gross shrinkage in the plant.[115] The price was divided into two parts, a payment of 26 cents per Mcf for "all gas consumed in the plant as fuel and for all shrinkage resulting from processing in the plant," and in addition a four cent per Mcf fee denominated a "Processing Fee:"

> "6.2. *Processing Fee*—As compensation to the company for gas processing and helium extraction rights, and for providing gas deliveries at suitable pressure, volume, and helium content, *and for the helium extracted,* the United States shall pay the Company a gas processing fee on the total volume of gas delivered to the helium plant and processed for helium extraction. Said processing fee shall be 4 cents per thousand cubic feet for gas having a weighted average helium content of 2.0 per cent during the billing period. . . . ." [Emphasis supplied.][116]

The contract provides further that "[i]f the weighted average helium content for the billing period is greater or less than 2.0 per cent, the processing fee shall be increased or decreased in accordance with the table attached hereto . . ." The average helium content of Keyes gas is two per cent by volume. This processing fee applies only to gas coming into the plant which is processed for helium removal, and is not paid when gas entering the plant is not so processed and is used merely for power.

At the time this contract was executed, Colorado Interstate purchased gas in the Keyes Field from some twenty-six companies or individuals, at a wellhead price approved by the Federal Power Commission (FPC) of fifteen cents per Mcf, which was adjusted due to low Btu content to

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[115] LPX 213; Helex 32.

[116] Ibid.

twelve cents per Mcf, upon which royalties were paid.[117] In addition, Colorado Oil and Gas Company, a wholly-owned subsidiary of Colorado Interstate, owned approximately one-half of the leasehold interests in the field, and Colorado Interstate paid this subsidiary the 12 cents adjusted price. Thus, for gas sold to the United States and used by it, Colorado Interstate paid, at the time the contract was executed, 12 cents per Mcf at the wellhead, and received 26 cents per Mcf for the gas used by the United States.

It is disputed whether the additional four-cent "processing fee' constitutes a payment for helium. Dr. Seibel, then with the Bureau of Mines, stated that the processing fee covered a "number of items which the government felt were quite valuable," including a guarantee of ownership of helium, a limitation on daily gas withdrawals from the field, obligations of the seller to minimize dilution of the helium content of the gas, an agreement to maintain fixed delivery pressure at the plant inlet regardless of variations in field pressure, and the exclusive right to process all Keyes gas for helium extraction.[118] Mr. Charles Wheeler of the Bureau of Mines characterized this fee thus:

> "In effect, this four cent processing fee assigns a market value of $2.00 a thousand cubic feet. Whether it was intended to do that or not that is initially what we got for the four cent processing fee, helium at $2.00 a thousand cubic feet."[119]

The two-dollar figure mentioned above does not appear in the Keyes contract. It may, however, be calculated therefrom. The Keyes gas constitutes two per cent helium by

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[117] LOX 60.

[118] Tr. 63:6038-6039.

[119] Tr. 66:6310.

volume. To obtain one thousand cubic feet of helium, thus, it is necessary to process 50,000 Mcf of gas. The processing fee for that quantity, at four cents per thousand cubic feet, equals two dollars. In other words, the contract requires that the United States pay the company $2.00 for the right to process sufficient gas to yield one thousand cubic feet of helium.

The next contract following the Keyes agreement was executed by the United States with Pan American on June 12, 1959, supplying the natural gas with about 5.6 per cent helium by volume, to the Navajo Plant.[120] It provided for payment as follows:

> "10.1 The price of gas delivered and sold by Company to the United States during the terms and under the conditions of this agreement, shall be nineteen (19) cents per one thousand (1,000) cubic feet, which price is made up of the following:
>
> | | |
> |---|---|
> | Helium | 11.6 cents |
> | Hydrocarbons | 1.8 cents |
> | Delivery | 5.6 cents |
> | | 19.0 cents" |

Mr. Wheeler of the Bureau testified that this attribution of 11.6 cents to the helium content of the gas was based upon the "formula" established in the Keyes Plant: that the value of two cents per one per cent of helium content was applied to a gas containing 5.8 per cent helium, resulting in a price of 11.6 cents per Mcf.

The two dollar figure referred as the "Keyes formula" has been considered in the United States contracts with the Helex companies. The formula is discussed in connection with our analysis of such contracts.

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[120] LPX 214; Helex Ex. 31.

Helium Conservation

Helium produced prior to 1960 was used primarily to meet current demands of both governmental and civilian users. These demands had risen sharply during the 1950's. From 1948 until 1956, helium sales increased five-fold.[121] This increase was due to the rapidly multiplying uses being developed for helium.

Its first large-volume use was as a lifting gas for lighter-than-air craft, commencing immediately after World War I. Prior to World War II, small but important quantities were also used in diving and submarine operations, and for medical purposes. During World War II, it became important in atomic energy and as a shield in arc-welding of such metals as magnesium, aluminum, and stainless steel. It is essential for much nuclear and cryogenic research, and its industrial applications are more numerous than ever before.

The conservation of helium was particularly a matter of federal concern. In 1955, 70 per cent of all helium produced by the Bureau was used directly by federal agencies, particularly the Department of Defense and the Atomic Energy Commission. At that time, projects involving over $6,000,000,000 were estimated to depend upon continued helium supplies. Over half of the remaining 30 per cent was used by private purchasers in work under government defense and atomic energy contracts.

As increasing helium demands threatened to outstrip the production capacity of the Bureau, concern arose that sudden defense mobilization requirements could not be met, and attention turned to both providing increased production capacity and the use of other helium sources, including

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[121] LPX 43, Report prepared in 1956 by Dr. C. W. Seibel, then Asst. Director of the Bureau of Mines, in charge of helium, titled "Helium — Uses — Requirements — Production — Conservation — Costs." p. 2.

the Hugoton and Panhandle Fields. A 1953 report of the Office of Defense Mobilization reported that in 1952, "more than seven million cubic feet of helium a day was going out of the western part of the Texas Panhandle Field in nine pipelines. . . ." [122] Further,[123] a report prepared in 1954 for the Bureau of Mines by a private engineering firm, called the Stone & Webster Report, was concerned primarily with developing adequate reserves and production capacity to meet any sudden military demand.[124] By 1956, the concern for helium was twofold, both to meet mobilization needs and to conserve an increasingly valuable and wasting natural resource.

Helium carried in natural gas to fuel markets does not burn, of course, and simply passes into the atmosphere at the burner tips. It constitutes approximately 1/200,000th part of the atmosphere and no economical method has been developed for its recovery from the air. Carried in the natural gas, it produces no heat. Moreover, it reduces the Btu yield of a gas stream by absorbing heat itself, sufficient to raise its temperature to that of the burner. The 1954 Stone & Webster Report stated that under then current natural gas production schedules, approximately two-thirds of the helium supplies would be dissipated within the next twenty years.

In 1957, a helium policy "working group", headed by then Undersecretary of Interior O. Hatfield Chilson, was constituted to determine how a national preservation policy should be implemented, and its cost. In its report in 1958, referred to as the Chilson Report, that group concluded that the "only practical method of conserving the large volumes of helium currently wasted to the atmosphere is

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[122] LOX 40, p. 12.

[123] LOX 42.

[124] LOX 42; See also a 1955 Bureau of Mines Report, "Helium—a Report for the Secretary of the Interior." LOX 47.

to construct and operate helium plants to extract the helium from helium-bearing natural gas before it is transmitted to fuel markets. . . ." [125] The basic plan of conservation was stated thus:

> "Ninety-nine per cent of the known helium-bearing natural gas resources in the United States is concentrated in four fields: (1) the Hugoton field of Texas, Oklahoma, and Kansas; (2) the Panhandle field of Texas; (3) the Keyes field of Oklahoma; and (4) the Greenwood field of Kansas. All of these fields have been developed by private companies to supply natural gas to fuel markets, and they are presently being produced for that purpose. So far as the gas companies are concerned, the helium is a minor impurity, and no effort is made to remove it. Consequently, the helium is transmitted to fuel markets along with the rest of the gas, and it eventually passes through the gas burners into the atmosphere without serving any useful purpose.
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> "The Hugoton, Panhandle, Keyes, and Greenwood fields contain approximately 119 billion cubic feet of potentially recoverable helium. About 60 per cent of this helium could be recovered in 13 helium plants located at strategic points on pipelines leading from the fields. . . ." [126]

The report also suggested helium thus recovered could be stored at Cliffside until withdrawn and refined to meet current demands of the United States and private companies.

The role of private industry in any helium program to be undertaken was considered as early as 1954, in the Stone & Webster Report, in which it was discouraged as

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[125] LPX 56, p. 10.

[126] LPX 56, p. 10-11.

inconsistent with the United States' paramount interest in helium. Again in 1957, Dr. Seibel wrote that "[p]rivate industry participation in the direct production of helium at this time will jeopardize future supplies of the important strategic commodity—helium, cost the taxpayers many millions of dollars annually, require the establishment of a Government commission to regulate the industry and involve heavy subsidies."[127] In 1958, however, the Chilson report recommended that private industry be given an opportunity to participate in the helium conservation program, but that a "completely private helium industry," resulting in promotion and sale of helium without regard to beneficial end uses, be avoided. Accordingly, it recommended that "the most satisfactory form of private participation would involve the purchase by the Government of all of the helium produced privately."[128] The Chilson Report was submitted to President Eisenhower and approved. The President thereupon promulgated a National Helium Conservation Policy, announced by the Secretary of the Interior on May 1, 1958.[129] In this press release, the Department stated: "Recovery of the helium from gas going to fuel markets will be accomplished in up to 12 plants, . . . to be constructed in or near the fields that produce the gas."

Thereafter in 1958, the Interior Department proposed legislation to Congress for the implementation of this conservation policy. This was not acted upon, and redrafted proposals were submitted again in 1959. With certain alterations, on September 13, 1960, the Helium Act Amendments were enacted, amending and replacing the Helium Act of 1925.

The 1925 Helium Act, Ch. 426, 43 Stat. 1110, was not itself a conservation act. It authorized the Secretary of

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[127] LPX 45.

[128] LPX 56, p. 15.

[129] LOX 81.

the Interior "for the purpose of producing helium with which to supply the needs of the Army and Navy and other branches of the Federal Government . . . to acquire [helium-bearing] land or interest in land . . . where necessary, when helium can not be purchased from private parties at less cost . . . ." The Act provided that all branches of the federal government could fill their helium requirements by purchases from the Bureau at "actual cost of said helium to the United States, including all expenses connected therewith . . . ." The leasing of surplus helium to private parties was authorized. An amendment in 1927, Ch. 355, 44 Stat. 1387, authorized the sale or leasing of a maximum of 5,000 cubic feet of non-surplus helium annually to aid scientific and commercial development. In 1930, the Comptroller General issued a ruling requiring the Navy Department and perhaps all other federal branches, to meet their helium needs by purchases from the Bureau. By Act of September 1, 1937, Ch. 895, 50 Stat. 885, amending the 1925 Helium Act the Secretary of the Interior was directed "if possible under the terms hereof" to acquire all properties developed or constructed by private parties prior to that time for helium production. It was pursuant to this authority as we said that the Girdler Corporation plants were purchased by the United States. The 1937 amendments also authorized the sale of helium for medical, scientific, and commercial purposes which was not needed for government use, such sales to be at "reasonable prices . . . based upon the cost of acquiring, developing, maintaining, and operating the Government properties . . . ."[130]

The 1960 Helium Act Amendments, 74 Stat. 918, 50 U.S.C.A. §§ 167 et seq., authorized the Secretary of the Interior to enter into long-term contracts for the acquisition, processing, transportation or conservation of helium, not exceeding twenty-five years. In addition, he was given

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[130] See LPX 32, Fig. 4, for graph outlining charges for helium to both federal and non-federal users.

the power to acquire, by eminent domain, helium contained in helium-bearing natural gas and so much of such gas as is necessarily removed in the extraction process, if he were unable to acquire helium otherwise upon reasonable terms and at the fair market value. The Amendments provided a new basis for establishing the price of helium sold by the Bureau. Whereas under the 1937 amendment, the price was to be based on the actual cost of helium to the United States, including all expenses connected with its production, the new price under the amendment was to be adequate to recover, within twenty-five years, all funds expended in the entire conservation program. This price was subsequently set by the Secretary at $35.00 per Mcf, the price at which helium is sold to both federal and non-federal users. The Amendments required that all contracts made by the Secretary for the purchase of helium from private plants contain provisions forbidding the sale of helium to any purchaser other than the United States at a price lower than the lowest price paid by the United States for helium produced from any private plant. The Amendments required further that all agencies of the federal government purchase their major requirements of helium from the Secretary, to the extent that supplies were readily available.

United States Helium Contracts

In 1960, directly after enactment of the Helium Act, the Bureau of Mines began to solicit the interest of private industry.

The number of parties who were in positions which permitted them to participate in the conservation who had the financial ability to perform a large government contract, was necessarily limited. Participation required that the contractor have in his control or access to, large volumes of gas with sufficient helium content to permit economical extraction, and in addition, ownership of such helium-

bearing gas streams, or at least the right to extract helium therefrom.

On October 11, 1960, the Bureau sent identical letters to 377 persons and firms who had indicated interest in the program.[131] On October 25, 1960, the Department promulgated guidelines by which proposals were to be evaluated.[132] The Bureau judged proposals on four criteria: how much helium conservation could the proposal assure, how soon would it be accomplished, the probable cost of such conservation, and the ability of the company to perform as proposed.[133]

Of fourteen proposals received by the government, twelve proposed to build and operate helium extraction plants.

After exploratory interviews with each of these twelve firms conducted by a five-man board constituted to evaluate and select companies for actual contract negotiations, four companies were selected on March 6, 1961, three being parties to these cases, Cities, Northern, and Panhandle.

Negotiations with these firms led ultimately to execution of contracts with their respective helium extraction subsidiaries: with Helex, Inc. (now Northern Helex, Inc.) on August 15, 1961; with Cities Service Helex on August 22, 1961; with National Helium on October 13, 1961. On August 21, 1961, the Bureau renewed its request for proposals from private industry to be submitted by September 15. Phillips thereupon submitted a new or altered proposal, which led to contract executed November 13, 1961.

From the announcement of the program in May, 1958, through execution of the last contract implementing it, the Bureau of Mines and Interior Department issued a total

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[131] Helex 170; Tr. 66:6347.

[132] LOX 120; Helex 171.

[133] LPX 91, App. 21.

of 11 press releases, announcing every major step toward implementation of the program.[134]

At no time during the formulation, promotion, or implementation of the conservation program did either the Bureau or the Department seek to discourage participation by any member or segment of the petroleum industry, including both pipeline companies and producing companies.

Lessee-producers allege that representatives of the Bureau of Mines commenced preliminary discussion and negotiations with Northern, Cities, and Panhandle and others controlling large volumes of helium-bearing gas, as early as 1958, long before enactment of the Amendments in 1960.

The evidence introduced to establish these negotiations [135] simply does not do so. Representatives of Northern and Cities consulted with the Bureau concerning the possibility of their participation.[136] No negotiation of contracts was conducted by the Bureau with any company prior to 1961, following public solicitation of proposals from private companies.

Lessee-producers complain of alleged pre-selection of sites for helium extraction plants. Commencing in 1956, discussions of alternative approaches to helium conservation within the Bureau contain repeated references to a projected twelve or thirteen plants, which could recover 60 per cent of the helium transported from the Hugoton area in natural gas carried to and wasted in the market. These sites were but recommendations, and no site selection was imposed upon any party seeking to participate in the program.[137]

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[134] Helex Ex. 59, 161, 166; LOX 117, 119, 120, 122, 127.

[135] LPX 57, 73, 80, 117, 118, 127, 128, 129, 145, 146 and 173; LOX 84; Tr. 79:7571.

[136] LPX 80, 117, 118.

[137] Tr. 67:6376.

Copies of a May 1, 1958, press release were sent to Cities Service Gas and Panhandle on May 6 after its issuance accompanying requests for gas samples and data regarding gas flows, pressures and seasonal variations in lines owned or controlled by these companies. The evidence discloses no preferential treatment given these or any other companies in announcement of conservation plans.

Helium which the United States purchases from each of the four extraction contractors is contained in a crude helium-gas mixture, which the contracts define as "the gaseous product resulting from the helium extraction operation . . . [and] comprised of helium predominately together with other constituents of the natural gas." In actual operations, the delivered gas mixture consists of about 70 per cent helium and 30 per cent nitrogen. This gas mixture is transported through a small diameter pipeline to Texas, where it is stored in the Cliffside underground reservoir. When needed, it is withdrawn and refined, prior to sale to about 99.99 per cent purity.

The prices stated in the contracts apply only to the volumes of helium *contained in* the helium-gas mixture, and not to the mixture itself.

The contract with Helex, Inc., provided for an initial unit price of $11.24 per Mcf for helium contained in the crude helium gas mixture delivered to the United States. Northern Helex produces this helium mixture in a plant at Bushton, Kansas, on pipelines of Northern Natural leading from the Hugoton area, commencing operations in December, 1962.[138]

The Cities Service Helex contract provided an initial price of $11.74 per Mcf which price has risen, pursuant to adjustment provisions in the contract, to approximately $12.23 at the time of trial. This helium is extracted at a plant constructed in Grant County, Kansas, on pipelines

[138] LPX 105.

of Cities Service Gas, leading from the Hugoton area, operations commencing in June, 1963.[139]

Under the National Helium contract, the United States agreed to a price of $11.78 per Mcf of contained helium, which had risen to approximately $12.35 at the time of trial.[140] This helium is extracted at a plant at Liberal, Kansas, located on pipelines of Panhandle leading from the area, commencing operations in July, 1963.

The contract with Phillips provided a price of $10.30, which, like the other contracts, is subject to escalation, although the present price is not disclosed. Helium sold thereunder is extracted in two plants, one in Sherman County, Texas and the other at Dumas, Texas, these commencing operations in December, 1962 and April, 1963, respectively.

Under each of these contracts, the United States is obligated to purchase the total helium production of each company for a period of twenty-two years, this obligation subject to the limitation that the United States' purchases are not required to exceed specified annual dollar maxima: $9,500,000 in the Helex contract; $9,100,000 in the Cities Service Helex contract; $15,200,000 in the National Helium contract; and $13,700,000 under the Phillips contract.

The United States negotiated the above unit prices in each contract on the basis of costs comparable to those it would incur in a government-owned plant located at the same place and in the same circumstances, adding thereto those costs of doing business applicable only to private industry, the cost of taxes, insurance and a return on private capital. As one of the costs of operating a government-owned plant, the United States included in its cost build-up a payment of $2.00 for helium contained in

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[139] Tr. 74:7070; LPX 106.

[140] Tr. 71:6789.

natural gas delivered at the extraction plant for processing.[141] This separation of two dollars of the unit price as applicable to the cost of helium contained in natural gas to be processed for its extraction does not appear in any contract itself. It appears only in evidence which reflects the manner in which the United States reached its own cost estimates to form a basis for actual contract negotiation. The figure reflects no more than the estimate of the Bureau of Mines of the cost it would probably incur, in the operation of its own extraction plant, to acquire helium extraction rights from a natural gas stream.

The contract unit price in each case is stated in two parts, Part One representing the cost of natural gas to the extraction company. [E.g., in the Cities Service Helex contract, it represents the "cost in the field of shrinkage and fuel gas," these being the "shrinkage in the volume of natural gas occurring as a result of the helium extraction process . . . and any such natural gas consumed as fuel . . ." A similar provision is contained in the National Helium contract.]

Part Two, the greater part of the price, represents the balance of the unit price. Respecting the total unit price, the contracts provide:

> "Payment for the helium-gas mixture sold and purchased hereunder shall be calculated and made on the basis of the contained helium therein. The unit price specified herein represents only the value of the contained helium and is applicable only to such contained helium. For the purposes of this contract, no value has been ascribed to gaseous products other than helium in the helium-gas mixture sold and purchased hereunder. Notwithstanding the foregoing, it is expressly understood and agreed by both parties hereto that payment in accordance with this article shall constitute full and complete payment for helium,

[141] See, e.g., LPX 91, App. 33.

nitrogen, methane, and any and all other constituents of the helium-gas mixture." [142]

The two parts are based on separate adjustment scales, Part One on the basis of the extraction companies' cost of gas, and Part Two according to the wholesale price index, exclusive of food and farm products.

The question of title to helium arose during negotiations. In each contract, the seller warranted title to the helium-gas mixture, or agreed to indemnify and hold harmless the United States for all claims of ownership by third parties to said mixture. The ultimate cost each seller might have to bear as a result of failure of title is limited, however, by provisions that the seller be reimbursed by the United States for all payments made in satisfaction or settlement of ownership claims to helium, to the extent that such payments exceed approximately $3.00 per Mcf of helium.

The contracts provide, in addition, that should seller's title to helium fail and seller cannot perfect it, that the United States is entitled to terminate the contract and to purchase the extraction plant itself.

Two contracts are in evidence under which gas is acquired for the extraction of helium therefrom, in which the two-dollar figure derived from the Keyes formula actually appears as payment for helium, both executed in 1965. Under a "Gas Exchange Agreement" between Phillips and Pioneer Production Company, Pioneer delivered to Phillips certain volumes of raw natural gas produced from the West Panhandle Field, Pioneer granting to Phillips the right to process the gas for helium extraction in the following language:

> "*Section 1.* Subject to the other provisions hereof, Phillips is granted the right to process all gas delivered to Phillips . . . and to remove any constituents therefrom so long as the gas which Phillips redelivers

[142] E.g., LPX 107, p. 9.

at Delivery Point 'B' complies with the specifications set forth in Section 2 . . . ."

"*Section 2.* As total consideration for such processing rights Phillips agrees to pay Pioneer a price of two dollars ($2.00) per Mcf for the Helium contained in the raw gas attributable to the residue gas Phillips delivers at Delivery Point 'B.' "[143]

So far as appears, this helium is subject to sale to the United States under Phillips' contract.

Likewise, under a gas sales agreement executed April 1, 1965, between Colorado Interstate Gas Company and Alamo Chemical Company, a wholly-owned subsidiary of Phillips, Colorado Interstate granted to Alamo the right to extract helium and liquefiable hydrocarbons, from gas produced principally from the Greenwood and Sparks Fields in Kansas. Alamo agreed to pay Colorado Interstate "Two Dollars ($2.00) per Mcf for the contained helium extracted and saved at the Greenwood Plant, as determined under Article VII hereof."[144]

The foregoing history and development of helium extraction from natural gas constitute basic facts which we must consider in determining landowners and lessee-producer contentions of their rights to the fund and landowners claims against the United States.

We turn to the Leases.

The Leases

As indicated at the outset of this memorandum, both landowners and lessee-producers argue that the extraction companies have no right, title or interest in the helium contained in the helium-gas mixtures delivered to the United States, or in any other non-hydrocarbon portion of that mixture. The landowners claim that helium did not pass to their lessees under the oil and gas leases by virtue of

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[143] Helex Ex. 112, p. 4.

[144] Helex Ex. 113, p. 26.

which natural gas has been and is being produced from their properties. The lessee-producers oppose this position, and urge that helium did in fact pass under those leases, but that it passed no further, i.e., that it did not pass to the pipeline companies under the gas purchase contracts by which they acquire natural gas from which helium is extracted.

We turn first to the arguments of the landowners, most of which are based primarily upon the granting language of the leases. Prior to trial, Ashland moved for summary judgment on the issue that oil and gas leases convey helium as a matter of law. This motion was overruled, in order that the court might consider evidence bearing upon the intention of the parties. In *Whitebird* v. *Eagle-Picher Company,* 390 F.2d 831 (10th Cir. 1968), the Court stated thus:

> "The vital and primary issue . . . turns upon the interpretation of the language of the leases. It has been observed that today's leases are generally both a conveyance and a contract and therefore, that it is 'more likely that a written lease is intended to be a complete and operative integration of agreement. [Footnote omitted.] 3 Corbin, Contracts § 587, at 508 (1960): 'Even when a contract has been fully "integrated" in the form of written words, those words never have a single, necessary, legally imposed meaning, unaffected by the other words and acts of the parties whether antecedent or subsequent. Those other acts and words are admissible in evidence, to discover both the meaning that one party intended and the meaning that the other party received.' Id. § 538, at 71. Therefore, although evidence which will vary, alter or contradict the express written provisions of the written leases cannot be considered, American Crystal Sugar Co. v. Nicholas, 124 F.2d 477 (10th Cir. 1941), evidence which aids in the interpretation of the leases' language and indicates the meaning the

parties intended and received may be considered. [Citations omitted.]" 390 F.2d at 834.

Accordingly, the court has received and considered much evidence of the development of gas production in the Hugoton gas area, leasing and production practices, and of the composition of natural gas, much of which has been considered in foregoing sections. Such matters are properly considered under the Restatement of Contracts, § 230, which provides as follows:

> "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person *acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration,* other than oral statements by the parties of what they intended it to mean." [Emphasis supplied.]

See *Southwest Kansas Oil & Gas Co.* v. *Argus Pipe Line Co.*, 141 Kan. 287, 291, 39 P.2d 906, 909 (1935). We turn to the language of the leases themselves.

Representative forms under which each named lessee-producer produces helium-bearing natural gas have been compiled with tabulations of acreages covered thereunder. The parties have stipulated that these compilations and tabulations are correct as to the named lessee-producers.[145]

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[145] "The number of leases on each lease form and the number of acres covered by each form are correctly stated and shown in the forms and statements filed in this action or related actions by named party lessee-producers. The unit designations, gas unitization agreements, pooling orders (or equivalent), gas division orders and stipulations of royalty ownership and the like attached to said statements are representative of the forms used by the respective parties submitting the same. Such forms and statements may be received in evidence in lieu of the introduction of each original instrument." (Pretrial Order, p. 11).

Many thousands of leases are involved herein, with over 150 different printed forms. Over seventy-five per cent of the leases have been executed since 1940. Leases held by named lessee-producers contain a total of fifty different granting clauses.[146] Six of these clauses are found in leases covering over ninety per cent of the acreage involved:[147]

KANSAS AND OKLAHOMA LEASES

	Percentage of Acreage
"oil and gas, casinghead gas and casinghead gasoline"	69.688
"oil, gas, casinghead gas, caseinghead gasoline and all other gases and their respective constituent vapors"	10.132
"oil and gas"	7.144
"oil, distillate, gas, casinghead gas, casinghead gasoline and all other gases and their respective constituent vapors	3.311
	90.275

TEXAS LEASES

"oil and gas"	39.860
"oil, gas and all other minerals"	25.517
"oil and gas, casinghead gas and casinghead gasoline"	14.545
"oil, gas, and all other minerals"	14.168
	94.090

Leases covering 99.99 per cent of the acreage involved herein contain the words "oil" and "gas". This conjunction of terms forms the heart of landowners' argument.

Of the fifty different granting clauses, landowners regard only five as conveying helium as part of the gas granted therein:

> "(21) oil, gas, sulphur and all other minerals (whether or not similar to those mentioned)."

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[146] LOX 838; see also LPX 237.

[147] LOX 838, Schedules II and III.

"(22) oil, gas, distillate, condensate, uranium, thorium, salt, sulphur and all other minerals, whether similar or dissimilar to those mentioned."

"(44) oil and gas, including casinghead gas, casinghead gasoline, condensate, and all related hydrocarbons and including all products produced therewith."

"(48) oil or gas, or both, including, but not as a limitation, casinghead gas, casinghead gasoline, gas-condensate, (distillate) and any substance, whether similar or dissimilar, produced in a gaseous state."

"(50) oil, gas, gas condensate, gas distillate, casinghead gas, casinghead gasoline, and all other gases and their constituent parts and other minerals produced in connection with oil and gas operations hereunder."[148]

Their interpretation of these five clauses rests upon language therein which specifically covers all gaseous substances without regard to their similarity or dissimilarity to "gas" in the phrase, "oil and gas."

The word, "gas", has two different meanings with which we are concerned. As a general term used in a physicist's sense to describe a state of matter, it is defined typically as an "aeriform fluid having neither independent shape nor volume but tending to expand indefinitely."[149] It is also used to describe natural gas, which is defined typically in mining and petroleum industry glossaries as "a mixture of gaseous hydrocarbons found in nature. . . ."[150] Nothing in the history of the word "gas" itself supports the argument that it defines only gaseous hydrocarbons. The

[148] LOX 838, Schedule I.

[149] LPX 241.

[150] Ibid.

word "gas" was coined in the early 17th century by a Dutch chemist, J. B. Von Helmont, from the Greek word "chaos" to signify a "spirit not capable of being coagulated." It later came to mean an "aeriform fluid" used synonymously with air, and was subsequently restricted to permanently elastic fluids such as oxygen and hydrogen, as opposed to vapors, such as steam. In the 19th century, it became common parlance for a mixture of carbureted hydrogen used to give heat and light, i.e., artificial gas. Gas as used to defined natural gas, did not appear as a dictionary entry until 1914, after which time natural gas was commonly described as combustible gas formed in and issuing from the earth's crust. The term, "natural", became affixed to gas to differentiate its superior fuel and illuminating qualities from artificial gas.[151]

Landowners' arguments that the term, "gas", as it appears in the leases is limited to gaseous hydrocarbons are fivefold. We treat each separately.

First, landowners argue that the Kansas Supreme Court has ruled, albeit by way of dicta, that helium is not conveyed by mere grant of "gas" and that this Court is bound thereby. In *Gilmore* v. *Superior Oil Co.*, 192 Kan. 388, 388 P.2d 602 (1964), the Court stated:

> "Construction of oil and gas leases containing ambiguities shall be in favor of the lessor and against the lessee. (2 Summerson Oil and Gas, perm. ed., § 372, p. 485; *Stady* v. *The Texas Company*, 150 Kan. 420 Syl. ¶ 2, 94 P.2d 322). It is puzzling to understand why the above textwriter had such difficulty with this rule for the reason that the lessee of an oil and gas lease usually provides the lease form or dictates the terms thereof, and if such lessee is desirous of a more complete coverage of the marketing of oil, gas, liquid hydrocarbons, or even helium gas, which has recently been found to exist in the minerals underlying the vast

[151] Tr. 12:1092 et seq.

> Hugoton field, the lessee has the opportunity to protect itself by the manner in which it draws the lease. Much more could be said on this point but extension of the discussion would be pure dictum and of no benefit to the bench, the bar, or the oil and gas industry." 192 Kan. at 391.

Conceding the foregoing is but dicta, landowners assert that this constitutes a clear and intentional statement by the Supreme Court of Kansas that an oil and gas lease does not convey helium unless it expressly so provides, citing *Curtis Publishing Company* v. *Cassel,* 302 F.2d 132 at 135 (10th Cir. 1962); *Whitaker* v. *Texaco, Inc.,* 283 F.2d 169 at 174 (10th Cir. 1960); *Jess Edwards, Inc.* v. *Goergen,* 256 F.2d 542 (10th Cir. 1958).

In each of the cited cases, the court held that federal courts, in diversity cases, must follow a "clear and unequivocal exposition of the law" in state court decisions, and that the force of statements could not be disregarded merely because they were dicta, and not necessary to the decision, following *Hawks* v. *Hamill,* 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933). We do not, of course, question the rule. We cannot concede its applicability here. The cited statement from the *Gilmore* case is in no way a clear and unequivocal statement that the meaning of "gas" in an oil and gas lease is ambiguous as to the coverage of any gaseous constituent in the reservoir.

Failing this, landowners argue that nonetheless, the word "gas" is ambiguous, and that such ambiguity must be resolved against the lessee. The alternative meanings alleged to constitute this ambiguity are the so-called "physicist's meaning," descriptive of a state of matter, and an alleged industry usage of the term "gas" to mean a mixture of gaseous hydrocarbons. Evidence offered to establish this usage simply failed to do so. Virtually no naturally-occurring gas in underground reservoirs exists in the entire Hugoton and Panhandle fields which conforms to this alleged usage. It was stipulated that in all instances, the

gas which comes out of the wells is a continuous uninterrupted stream of gas emanating from the wellhead and remains such during its transmission to the helium extraction plants of each plaintiff extraction company.[152] No natural gas company, pipeline or producer, in the Hugoton area handles any unprocessed natural gas which is a physically and chemically pure hydrocarbon mixture. We cannot accept, as an industry usage, a definition which is so remote from the realities of that industry.

We must find, therefore, that the word "gas" as it appears in oil and gas leases is not ambiguous by reason of the alternative meanings recited above. We would note that did such usage exist, there would be no reason to apply it to oil and gas leases. By landowners' own evidence, from a random sampling of 984 leases, it appeared that 65 per cent of the sample was taken by independent lease brokers, and not by representatives of the producing industry.[153]

Thirdly, landowners rely upon the rule of *ejusdem generis,* whereby a general term in a series may be given a limited meaning by other specific words therein. Oil, it is argued, is synonymous with petroleum, which means liquid hydrocarbons; it is followed in 99.99% of the leases by gas, a term which, in its most general application, signifies any substance existing in a gaseous state regardless of composition. Being conjoined with oil, it cannot be held to have been used generally, but specifically, to convey only those gases similar to oil, i.e. those hydrocarbon compounds in a gaseous phase.

This argument was raised and rejected in *Navajo Tribe of Indians* v. *United States,* 364 F.2d 320 (Ct. Cl. 1966), wherein the court states:

> "Plaintiff argues that, under the rule of *ejusdem generis,* the term 'gas' in the granting clause is limited to

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[152] Dkt. 59, W-3009.

[153] LOX 794; Tr. 4:284 et seq.

> hydrocarbons, i.e., gases associated with oil. We see no reason to apply *ejusdem generis* to a phrase such as 'oil and gas,' and plaintiff cites no authority for doing so." 364 F.2d at 327.

We likewise think the argument is without merit. The word "oil" used in its ordinary, common, general and popular sense in oil and gas leases refers to crude oil as it is produced from the mouth of the well. See *Hammett Oil Co.* v. *Gypsy Oil Co.*, 95 Okla. 235, 218 Pac. 501 (1921). There is no evidence that crude oil is a physically and chemically pure mixture of hydrocarbon compounds. That oil, in the sense of petroleum, for which landowners contend, is a mixture of hydrocarbons and other substances is a fact of which the court may take judicial notice. Petroleum is defined in Webster's Third New International Dictionary as follows:

> "1. : An oily flammable bituminous liquid that in the crude state often has a very disagreeable odor and may vary from almost colorless to black but is usu. of a dark brown or greenish hue and sometimes fluorescent, that occurs in many places in the upper strata of the earth either in seepages or in reservoir formations from which it is obtained by drilling and pumping if necessary, that is essentially a complex mixture of hydrocarbons of different types with small amounts of other substances (as oxygen compounds, sulfur compounds, nitrogen compounds, resinous and asphaltic components, and metallic compounds), that is sometimes classed as paraffin-base, asphalt-base or naphthene-base, or mixed base . . .
>
> 2: any of various substances (as natural gas or shale oil) similar in composition to petroleum."

We must conclude, first, that resort to the rule of *ejusdem generis* is neither appropriate nor justified to determine the meaning of the word "gas", and secondly, were it properly

applicable, the term "oil" provides no limitation upon the kinds of gases conveyed under the leases.

Moreover, the rule of *ejusdem generis* is but "merely a phase of the more general rule that the contract must be interpreted as a whole," and "frequently must yield to other more pressing considerations." 3 Corbin on Contracts, § 552. Literal application of the rule was sought *In re Estate of Trester,* 172 Kan. 478, 241 P.2d 475 (1952), to include clay with a grant of "oil, gas and other minerals." The Court rejected this argument:

> "It is true that in classifying things as animal, vegetable and mineral, everything that goes to make up the earth comes within the general classification of minerals. But this general classification cannot be used for the interpretation of instruments granting specific rights. With respect to that matter the term 'mineral' is not a definite one capable of universal application. It is susceptible to limitations according to the intention of the parties using it, and in determining its meaning in a specific instrument not only the language of the instrument in which it occurs but also the relative positions of the parties interested and the substance of the transaction which the instrument embodies must be taken into account." 172 Kan. at 482-483.

"[T]he rule of adjusdem generis [sic] is not properly applicable where the result would be contrary to the plain and clear intention of the parties." *Cronkhite* v. *Falkenstein,* Okla., 352 P.2d 396 (1960).

The landowners introduced much testimony to show precisely that landowners had *no* intention whatever respecting helium, and moreover that "gas" or "natural gas" would evoke no association with helium. Dr. Bergen Evans, a noted professor of English, etymologist and lexicographer, canvassed a compilation of 270 dictionary and en-

cyclopedia entries concerning "gas" and "natural gas" [154] and noted the relative infrequency with which helium is mentioned in relation to either term. He concluded thus:

> " . . . I conclude as a lexicographer, not as a geologist or an oil man or a signer of leases, simply as one who has examined the words, on the basis of the 270 dictionary and encyclopedia entries concerning 'gas' and 'natural gas' . . . the said entries appearing over a period of more than fifty years, that the ordinary man could not be reasonably expected to connect 'helium' with 'natural gas.' " [155]

He also examined a series of newspaper searches, one covering certain Kansas newspapers, particularly in Liberal and Hutchinson,[156] and another covering newspapers published in Guymon, Oklahoma,[157] between 1920 and 1960. In the Kansas newspapers, helium was mentioned in 163 items over this forty year period, and in 36 items in the Oklahoma newspapers.[158] By extrapolation to demonstrate the lack of association between the two words, he found that the word "gas" appeared singly or in the phrase "natural gas" approximately 213,302 times, and helium, 1,010 times. He concluded, thus, that "the word 'helium' was a very rare word; that the word 'gas' was an exceedingly common word with the implication that 'gas' was very much in the thought of the people in this area at that time, that 'helium' rarely was." [159]

Again, from an examination of a collection of 1,042 articles or excerpted items from 28 daily newspapers and 22

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[154] Helex 128, Parts 1-3.

[155] Tr. 13:1160.

[156] LOX 776 thru 786.

[157] LOX 788.

[158] Tr. 11:904; 12:1040.

[159] LOX 789; Tr. 13:1148.

periodicals in which the word "helium" appeared,[160] he again concluded that "the association of 'helium' with 'natural gas' or the word 'gas' in the sense of 'natural gas' has over the last 65 years been exceedingly rare."[161]

Dr. Evans' opinion that the word "gas" did not connote helium to the average lessor or landowner in Southwestern Kansas, Western Oklahoma or Northern Texas, between 1916 and 1960, is based upon the statistical incidence of the two words and the relative frequency of their association in dictionaries, encyclopedias, area newspapers and selected magazine articles.

The evidence seems clear that gas did not connote helium specifically to the average lessor, and that no landowner specifically contemplated helium in granting rights to produce "gas." Similarly, however, there is no evidence that any landowner regarded oil as a physically pure mixture of liquid hydrocarbons, or regarded "gas" as composed solely of hydrocarbons. It would be the sheerest fiction, in our view, to apply the rule of *ejusdem generis* to determine that the average lessor intended *not* to convey helium, when other evidence establishes that he had no intention whatever respecting it.

This question of intention, however, leads to the landowners' fourth argument, which may fairly be summarized as follows. The value of natural gas lies primarily in its suitability for use as a combustible fuel; however, helium is valueless as a constituent of the fuel stream, and the average landowner or lessor could not have intended to convey helium as a part of the gas stream.

The end uses of natural gas produced in the Hugoton and Panhandle fields, however, are not limited to fuel alone, and the economic value of natural gas does not lie in its combustible or hyrdocarbon properties alone. The principal

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[160] Helex 131.

[161] Tr. 13:1181.

use of gas has been and is, of course, for fuel. The second most important use of gas is as a feed stock for petrochemical operations.[162] The manufacture of carbon black, by the incomplete combustion of natural gas with oxygen, has long been a major use of natural gas. Until 1942, the greater part of the gas produced from the Panhandle field was used in carbon black manufacture and gasoline extraction, and not to serve pipeline consumer and industrial fuel markets. Natural gas is also used as a pressuring agent in oil production, in fire-flood, secondary recovery programs, as a purge for pipelines, and as a cushion gas in underground gas storage reservoirs.

Certainly, it was the common understanding among landowners in the area that the marketability of gas underlying one's property depended upon its being at least moderately combustible, sufficient to justify connection of the well to a pipeline, a town or city distribution system. On the other hand, no lessor ever limited the commercial end use of any gas produced under a lease granted by him, and there is no evidence that any lessor ever intended not to sell any and all gas produced thereunder for whatever market existed. In the only instance before a court where the marketability

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[162] Tr. 72:6850-6851; Tr. 52:5009. [Helex 103 shows the actual and theoretical chemical compounds which are or may be derived from the constituents of natural gas. Hydrocarbon compounds are separated by the process of fractionation, and are put to diverse end uses: e.g., normal butane is used as a propellant in aerosol containers, as a feed stock in the manufacture of synthetic rubber and acetate rayon; both nitrogen and hydrogen are used in the manufacture of ammonia; normal hexane is used as a solvent in food processing. Non-hydrocarbon components of natural gas are also widely used. Phillips, e.g., markets elementary sulphur extracted from hydrogen, sulphide, itself combustible though not a hydrocarbon compound. Mercaptans, hydrogen and sulphide compounds, are manufactured from hydrogen sulphide and marketed to stench or odorize natural gas and liquefied petroleum gas. Carbon dioxide is produced and marketed as a separate commodity from natural gas.]

of a gas depended upon its helium content and fitness for helium extraction, the lessor made no claim that helium did not pass under the lease. On the contrary, when the helium plant closed for want of a market for helium, and production from the well was stopped, the lessor claimed abandonment of the lease. (See the factual situation in *Hoff* v. *Girdler,* 104 Colo. 56, 88 P.2d 100 (1939), involving a well serving the Thatcher, Colorado helium plant operated by the Girdler Corporation, referred to earlier herein.)

At least six witnesses who had either taken leases themselves or supervised leasing activities testified that neither they, nor to their knowledge any other landman or lease negotiator, had ever discussed the gas stream sought to be leased in terms of its constituents. The only lease in evidence making specific provision for helium is a lease to the Shamrock Oil & Gas Corp., dated April 13, 1965,[163] long after the commencement of this litigation, where although the conventional granting language of "oil, gas and all other minerals" was unchanged, a special royalty provision for helium was inserted.

In our view, this argument is but an attempt to convert an uninformed popular notion respecting the commercial uses of natural gas into an intention by the lessor to convey only those discrete constituents of the gas stream, the uses of which conformed to that notion. In *Utilities Production Corp.* v. *Carter Oil Co.,* 72 F.2d 655 (10th Cir. 1934), the Court stated:

> "But the argument that the parties contemplated the use of gas only for such methods of operation and development as were known to the industry the day the leases were signed, is specious. It imputes to the parties an intention to encase themselves, during the terms of the leases, in a straight-jacket. The oil business, then and now, is one in which changes

[163] Shamrock Ex. 1, No. 103/4530.

> come with lightning-like rapidity. A review of the patent causes in the courts discloses the frequent and radical changes made in the methods of oil operations and development. The argument leads to the conclusion that residue gas could not be used even for drilling if the lessee used any improvement in drills or casing-shoes which was invented after the lease was made. Such a foreshortened intent cannot be imputed to the parties, for they knew that improvements would come about during the terms of the leases, and must have contemplated the use of such improved methods . . . ." 72 F.2d at 659.

We cannot import into a plain grant of "oil and gas" an intention on behalf of either the lessor to convey, or the lessee to receive, only those gaseous constituents of the stream the end uses of which conform to a subjective notion of the commercial end uses of the gas stream at the time of lease execution. This argument is without merit.

Landowners' fifth argument rests upon language found in granting clauses of nearly all the leases herein, which describe the lessee's rights upon the premises. Typically, this language provides that the lease is granted for the "sole and only purpose of mining and operating for oil and gas, and laying pipe lines, and building tanks, power stations and structures thereon to produce, save and take care of said *products* or *substances* . . . ." [Emphasis supplied.] Landowners argue simply that "[r]eference to things leased, including gas, as products or substances seems wholly incompatible with reference to a state of matter. [Landowners' Post-Trial Reply Brief, p. 19]. This reference is irrelevant, in our view, to construction or interpretation of the word "gas."

No case cited by landowners supports any of their arguments that gas conveyed by oil and gas leases is limited to gaseous hydrocarbons only.

Landowners rely in part upon a group of cases known as the Oklahoma "casinghead gas" cases. In *Hammett Oil Co.* v. *Gypsy Oil Co.*, 95 Okla. 235, 218 Pac. 501 (1921), plaintiff owned two-thirds of a 40 per cent interest in oil production which had been retained by an original lessee who had sub-leased part interest to defendant. Defendant contracted with the original lessors to manufacture gasoline from casinghead gas produced from oil wells. Plaintiff asserted that gasoline manufactured from casinghead gas from an oil well was oil, and entitled to royalty thereon. The court stated the familiar standard of interpretation:

> "In our judgment the question is not whether gasoline manufactured from casing head gas is oil in a technical sense, but whether it is oil in its ordinary and popular sense, and was so understood by the parties to the oil and gas lease. . . ." 218 Pac. 502.

The court found that oil, in its ordinary and popular sense as used in the lease referred to crude oil in its natural state as it was produced from the mouth of the well.[164] The court held that casinghead gas did not constitute oil upon which a royalty was payable.

A different result was reached in *Twin Hills Gasoline Co.* v. *Bradford Oil Corp.*, 264 F. 440 (E.D. Okla. 1919), wherein the lease provided separately for royalty on oil and a yearly payment of $200 on each gas-producing well. It provided further that the lessee would have the right to use casinghead gas from the wells of the lease for their operation. It appears that plaintiff sought $200 for each well from which casinghead gas was produced and sold, notwithstanding an oil royalty was being paid on

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[164] By necessary implication it does not mean a chemically pure mixture of liquid hydrocarbons.

production therefrom. The court held that casinghead gas was oil, reasoning thus:

> "In determining what the intent of the parties was, we look to the surroundings, the location, and the conditions of the oil business at that time. The evidence discloses that casing head gas is a component part of oil, that casing head gas is not made from dry gas, and that it is not a product of dry gas, but that it is a product of wet gas, and that wet gas exists only with oil. Therefore, casing head gas is a component of oil." 264 F. at 441.

In *George* v. *Curtain*, 108 Okla. 281, 236 Pac. 876 (1925), the court held specifically that casinghead gas was neither oil nor gas under an oil and gas lease which provided a royalty on oil from an oil well, and on gas from a gas well, but not for gas produced from an oil well:

> "[W]here the lease contract . . . was made prior to the time when casing-head gasoline was known to be of commercial value, and no mention made of the casing-head gas to be taken from the oil wells, we are forced to the conclusion that that subject was not within the contemplation of the parties when the lease contract was entered into, and is therefore not covered or controlled by said lease contract." 236 Pac. at 877.

The basis for this rule is stated in *Broswood Oil Co.* v. *Sand Springs Home*, 178 Okla. 550, 62 P.2d 1004 (1936):

> "Common usage of the terms 'oil' and 'natural gas' is the basic principle upon which the foregoing holding is based. A lease executed for the sole and only purpose of mining for oil and gas, reserving to the lessor a royalty on oil and on gas, means oil in its ordinary acceptation and *gas from a gas well as the same is ordinarily understood* . . . and in the absence of a contrary intention of the parties the courts will so construe the lease contract. Sections 9467, 9468, O.S. 1931." 62 P.2d at 1006. [Emphasis supplied.]

In *Navajo Tribe of Indians* v. *United States, supra,* the court suggested that the "Oklahoma courts were motivated by a desire to insure adequate compensation for the lessors." 364 F.2d at 326. It may equally be argued, however, that the Oklahoma courts regarded the provisions for royalty to indicate the common and ordinary meaning attributed to oil and gas by the parties, and that gas produced from an oil well did not fall within that manifest contemplation. In Oklahoma, the rules of construction are statutory.[165]

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[165] 15 Okl. St. Ann:

§ 152. A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.

§ 154. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

§ 160. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

§ 161. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.

§ 163. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

§ 164. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

§ 170. In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party . . . .

In *Lone Star Gas Co.* v. *Stine,* 41 S.W. 2d 48 (Tex. Com. App.) (1931), 82 A.L.R. 1299, plaintiffs had executed certain gas deeds conveying to the defendant gas company all their "rights, title and interest . . . present and prospective, in all natural gas" in the described property, reserving to themselves all oil rights. The defendant later constructed an absorption plant to extract gasoline carried in the gas in the form of vapor. Plaintiff claimed that gasoline thus extracted was oil, not "natural gas", and therefore an one-eighth royalty was due. The right to helium was not an issue. The court stated:

> "The gas company paid a large consideration running into thousands of dollars for 'all natural gas' in and under these lands. An examination of the several instruments clearly discloses that the gas conveyed was not limited to any particular kind or character of gas, but the conveyance is all-embracing as regards gas, and covers and includes 'all natural gas.' The term 'all natural gas' would include all the substances that come from the well as gas, and that regardless of whether such gas be wet or dry. *It is undisputed in the evidence that the term 'natural gas' includes numerous elements or component parts, but the very language of the conveyance is such as to include therein all these component parts which were in gaseous form when they came from the wells.*
>
> • • • • •
>
> This gasoline was separated from the gas and became liquid only when it was subjected to the manufacturing process shown above. It is true that the gasoline element was in the gas when it came from the well, but it was then in gaseous form, that is, it was an element or component part of the natural gas, and gas or natural gas was the thing conveyed by the deeds. The legal effect of the deed was to convey 'all natural gas,' and *by the term 'natural gas' is*

meant all the constituent elements composing the same." 82 A.L.R. at 1302-1303. [Emphasis supplied.][166]

Where language of a contract is doubtful or uncertain, a practical construction which the parties placed upon the contract over a long period of performance may be examined to arrive at the parties' intent and purpose. *Moore* v. *Jones,* 215 F.2d 719, 721 (10th Cir. 1954). All the landowners have done is to execute leases drawn by the lessee, and receive the fractional royalty by lessee on all gas produced, without qualifying or limiting the gas upon which such royalty is payable. Royalty clauses typically require payment of a fractional royalty, usually one-eighth, of the proceeds of the gas sold at the well, or if marketed off the lease premises, one-eighth of the market value of the gas at the wellhead. The nearly universal practice is to measure the volume of gas produced from the well by an orifice meter placed at or near the wellhead, which meter measures the entire volume of gas passed through the meter. The royalty is the product of a price stated per Mcf of gas multiplied by the number of Mcf passing through the meter. So, the pertinent conduct of the landowners is to have received payment for many years of a royalty based and computed on the total volume of gas produced, without objecting that the lessee was not entitled to all of the volume for which he tendered payment.

Likewise, lessee-producers have dealt with the total stream produced from the well, without regard to its separate constituents. They have produced it as a single

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[166] An operating agreement between the parties provided that plaintiff, having reserved the oil, could purchase any well producing oil only, and the gas grantee could purchase all gas wells. The court held the terms "gas" and "natural gas" to be synonymous.

stream, measured it thus and computed royalty payments on a volumetric basis.

Moreover, lessee's right to drill, produce and market gas under a lease is exclusive. A lessee "has the exclusive right to produce oil and gas from the premises for the time named in the lease . . . ." *Shaffer* v. *Kansas Farmers Union Royalty Co.*, 146 Kan. 84 at 89, 69 P.2d 4 (1937). It is a grant of the "exclusive right . . . to take all the oil and gas that could be found by drilling wells upon the particular tract." *Rich* v. *Donaghey*, 71 Okl. 204, 177 P. 86, 89 (1918), and see *In re Levy*, 185 Okla. 477, 94 P.2d 537, 538 (1939). In Texas, an oil and gas lease grants the lessee exclusive rights to all oil and gas therein. See *Howell* v. *Comm'r of Internal Revenue*, 140 F.2d 765 (5th Cir. 1944), *certiorari den.*, 322 U.S. 735, 88 L.Ed. 1569, 64 S.Ct. 1048.

The conduct of the parties bears upon another issue, however, insofar as it may be relied upon by any adverse claimant to the funds in issue as a basis for estoppel against the landowners who seek to press their own claims.

In 28 Am. Jur. 2d, *Estoppel and Waiver*, § 27, the writer offers the following encylcopedic definition of estoppel:

> "The most comprehensive definition of equitable estoppel or estoppel in pais is that it is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed."

In *Gas Service Co.* v. *Consolidated Gas Utilities Corp.*, 145 Kan. 423, 65 P.2d 584 (1937), the court approved the words of another encyclopedist:

> "The rule as to what should constitute equitable estoppel is very well stated in 10 R.C.L., page 689. There it is said:
>
> " 'So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. . . . The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all of the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice.' " 145 Kan. at 435-436.

Landowners are not estopped to claim the fund as against the adverse stakeholders, for, to paraphrase *Gas Service Co., supra*, "there can be no claim that the conduct of [plaintiffs] was influenced by any conduct or concealment or positive action on the part of . . . [defendant landowners]." 145 Kan. at 436. For the identical reason, the landowners here are not estopped in their claims to the fund as against their fellow claimants, the lessee-producers, for no conduct of the landowners has in any way prejudiced or otherwise affected the claims of the latter to the fund.

In view of the circumstances existing at the time of the lease executions, the definition and usage of terms within the industry, and by the intention of the parties as disclosed by their actions, the court concludes that the grant of gas in each of the leases herein extends to the

entire gas stream which emerges at the wellhead absent an express reservation of any constituent products, and that helium passes thereunder unless expressly reserved.

Gas Purchase Contracts

The next question is whether title to helium passed not only from the landowners to the lessee-producers but from the lessee-producers to their pipeline company purchasers. This question rests upon the gas purchase contracts under which the lessee-producers sell and deliver natural gas to the pipeline purchasers.

Insofar as pertinent herein, the typical contract contains a recital clause, a definition of gas, a dedication or commitment of described acreage, reservations therefrom and processing rights, if any, statements of the quantities to be produced and delivered, pricing provisions, Btu rejection and/or price adjustment clauses, quality standards, provisions for standards and methods of measurement, billing and payment procedures, and warranties of title.

Recital clauses, when they occur, frequently express with varying brevity or elaborateness the interest of the buyer, as owner of a natural gas pipeline system, in acquiring additional supplies of gas therefor.[167]

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[167] See, e.g., contract dated March 12, 1948, between United Producing Co. and Cities Service Gas Co.:

> "Cities is engaged in the business, among other things, of producing and purchasing natural gas and selling same as wholesale to distributors of natural gas in numerous towns and communities in a wide area comprising several states of different climatic and temperature characteristics. In order to meet the requirements of its said customers, it is desirous of obtaining, from time to time, supplies of merchantable natural gas, in addition to its present supply, that will be ample to meet, insofar as is possible, at all times and over a long period of years, the demands of its customers at the various times such demands occur in its widely distributed markets." Ashland FPC Rate Schedule 111, Ashland Ex. 5; Tr. 37:3740.

Definitions of gas are expressly comprehensive, and refer typically, for example, to "all gas produced from gas wells including all gases indigenous to the reservoir . . . ;" or "the entire stream flowing from a well including all compounds, elements, and mixtures indigenous to the reservoir . . . ;" or "raw natural gas indigenous to the reservoir" or "raw natural gas, without removal of any of its constituents."[168] Gas and natural gas are used interchangeably throughout these contracts with the same meaning.

Dedication or commitment clauses describe the acreage or wells from which gas is committed to performance of the contract. Every commitment clause contained in a Panhandle contract with a named lessee-producer specifically dedicates *all* gas which is produced, or which can be commercially produced, or in which seller has an interest.[169] Leases under which production is committed are generally identified in the contracts by legal description of the acreage, name of lessors, dates of leases, and the name and percentage interest of the seller. These dedication or commitment clauses made no distinction as to the composition of gas from the committed acreage.

From gas from the committed acreage, there may be reserved to the seller oil, casinghead gas, gas used in lease operations, liquid hydrocarbons, oil or condensate removed by separators, and liquefiable hydrocarbons, all removed according to specific processing rights elsewhere in the contract. It is the practice in the industry that no seller of gas retains rights to process the stream for removal of any of its constituent parts, such as gasoline, or liquid or liquefiable hydrocarbons unless the right is specifically reserved to him in the contract. Six Panhandle contracts, all executed since 1963, reserve to the seller the right to process the gas stream for the ex-

[168] Helex Ex. 85, part 1.

[169] Helex Ex. 84.

traction of helium, but that if he fails to do so, or to commence extraction within a given period of time, its rights under that reservation terminate.[170]

Statements of quantity to be produced are typically stated in terms of volume. Production from pro-rated wells, of course, is determined by the production allowances assigned by state regulatory bodies. For non-prorated wells, annual production is frequently stated by the contract to be at an annual rate which will cause depletion of the well within a period of years, commonly twenty; non-prorated production may also be stated to be in volumes ratable with all other wells connected to the buyer's system producing from a common source of supply.[171]

The price is universally stated in cents per thousand cubic feet (Mcf), and the unit of measurement is typically stated as "1000 cubic feet (Mcf) of gas at a temperature of sixty degrees (60°) Farenheit and an absolute pressure of fourteen and sixty-five hundredths pounds per square inch (14.65 psia)."[172]

Nearly all contracts held by interpleading plaintiff pipeline companies with named lessee-producers contain what are referred to herein as "Btu clauses."[173] Btu is the abbreviation for British Thermal Unit, the amount of heat required to raise one pound of water one degree Fahrenheit at 39.2° Fahrenheit. Btu clauses are of three basic kinds. Nearly all contracts contain Btu rejection clauses, which permit the buyer to refuse gas which yields less

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[170] Helex Exs. 84, 85.

[171] Helex Ex. 84.

[172] Ibid.

[173] LPX 220.

than a specified number of Btu's per cubic foot of gas.[174] The second type, the downward Btu price adjustment clause, or penalty clause, permits the buyer to reduce the price payable in proportion that the Btu yield falls below a specific level per Mcf. Rejection and penalty clauses are typically combined, with the penalty invoked at a level somewhat higher than the rejection level. Penalty clauses may require the price reduction to be computed by either a proportionate, calculated reduction in the volumes upon which the contract price is payable[175] or by proportionate reduction in the price itself.[176] A limited

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[174] "4.2. Minimum. The gas delivered hereunder shall have a heating value of not less than 1,000 BTU per cubic foot. If the heating value of any gas tendered hereunder shall be below 1,000 BTU per cubic foot, Buyer may, at its option, refuse to accept delivery of such gas, in which event the producing horizon from which the substandard gas is being produced . . . shall be released from the terms and conditions of this Agreement." Gas purchase agreement between Pan American Petroleum Corp. and Panhandle Eastern Pipe Line Co., March 5, 1958, Gulf FPC Rate Schedule 167, Gulf Ex. 18.

[175] "If in any month, the average total *heating value,* when saturated with water vapor, of the gas delivered hereunder shall have been less than 1,000 B.T.U. per cubic foot of gas, then the volume of gas measured hereunder during each month shall be reduced by multiplying the volume delivered by the quotient obtained by dividing the average heating value of the gas delivered in B.T.U. per cubic foot by 1,000." Gas purchase contract between United Producing Company, Inc., and Argus Natural Gas Company, August 25, 1943, Ashland FPC Rate Schedule 116, Ashland Exh. 7.

[176] "(b) *Adjustment for Deficiency.* If the weighted average gross heating value of all gas delivered hereunder during any month shall be less than 950 Btu per cubic foot when saturated with water vapor, then the applicable price . . . . which would otherwise be payable for all gas delivered hereunder during such month shall be reduced by multiplying said price by the quotient obtained by dividing the weighted average gross heating value of the gas so delivered, expressed in Btu per cubic foot when saturated with water vapor, by 950; provided, however, such adjusted price shall never be less than 9.8262 cents per one thousand cubic feet (MCF)." Contract between United Producing Co. and Northern, now Ashland FPC Rate Schedule No. 122, Ashland Ex. 10.

number of contracts contain *upward* Btu price adjustment clauses, whereby the price is proportionately increased for gas containing over a given number of Btu's.[177]

Btu clauses are commonly placed in the "Quality" sections of the contracts, which also typically state maximum levels for so-called impurities, such as hydrogen sulphide, sulfur, carbon dioxide, uncombined oxygen, and require that the gas delivered be merchantable, or as produced in its natural state, and that it be practically free of foreign materials and objectionable substances, such as water, crude oil, dust and the like.

Billing is generally provided to be by monthly statements showing the amount in volumes of gas delivered during the preceding month.

We find no contract in which the seller does not warrant title to the gas delivered to the buyer. Such warranties typically extend to all *gas* delivered.

Since 1960, a few Panhandle gas purchase contracts provide expressly for the reservation of helium to the seller

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[177] See contract executed April 6, 1960, between United Producing Co. and Panhandle Eastern, now Ashland FPC Rate Schedule No. 142, Ashland Ex. 14:

> "(c) *Adjustment of Price:* If the heating value of the gas delivered to Buyer at any delivery point shall be less than 1,000 Btu per cubic foot, then the price payable for such gas delivered at such delivery point shall be proportionately reduced, and, if the heating value of such gas is greater than 1,000 Btu per cubic foot, then the price for such gas shall be proportionately increased. To determine such increased or reduced price, the applicable price . . . shall be multiplied by a factor, the denominator of which shall be 1,000 and the numerator of which shall be the heating value of the gas delivered at such delivery point; provided, however, notwithstanding anything herein to the contrary, the factor used in determining such increased price shall not in any event exceed 1.2 even though the heating value of the gas is found to be in excess of 1,200 Btu per cubic foot."

in accordance with specified processing rights. One form of reservation permits the producer to remove helium prior to delivery to seller at points at or near the wellhead; as to all helium not so removed, the seller warrants title.[178] Another provision permits the seller to elect within the first two contract years to extract liquefiable hydrocarbons and/or helium, and requires commencement of extraction within three years. Failing this, such rights terminate.[179] A third variation provides that upon failure to commence extraction within three years, seller expressly releases all claims to helium contained in gas delivered under the contract.[180]

Lessee-producers' contentions are basically threefold: that natural gas, or gas, as used in those contracts, is used with a trade or industry meaning to describe gaseous hydrocarbons alone; that by operation of Btu price adjustment clauses payment under those contracts is geared to the hydrocarbon content alone, and helium, although delivered in the gas stream, is not paid for; and lastly, that construction of the contracts to cover helium would be repugnant to both Section 11 of the 1960 Helium Act Amendments, and the Natural Gas Act.

We turn first to the alleged industry meaning of the terms "gas" and "natural gas" to define "a mixture of gaseous hydrocarbons, formed in nature and found in the earth." A number of witnesses with long experience in the industry testified to such a usage.[181] A number of definitions of gas and natural gas from mining, petroleum engineering, and geology glossaries and dictionaries, the publication dates of which span the period from 1914 to

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[178] See, e.g., Ashland Exh. 17, p. 17.

[179] Ashland Exh. 14, p. 29.

[180] E.g., Cities Service Oil Exh. 6, FPC Rate Schedule 138, p. 24 of contract dated March 24, 1960.

[181] Tr. 37:3731, 3737; 43:4275-4290; 44:4297-4299.

1965, were introduced into evidence.[182] In the earliest publication, a United States Geological Survey glossary published in 1914, natural gas is defined as a "mixture of gaseous hydrocarbons found in nature; in many places connected with deposits of petroleum, to which the gaseous compounds are closely related,"[183] a definition which appears frequently thereafter. A petroleum refining glossary published in 1953 by the American Petroleum Institute defines natural gas as "[g]aseous forms of petroleum, commonly called 'natural gas,' [which] consist of mixtures of hydrocarbon gases and vapors, the more important of which are methane, ethane, propane, butane, pentane, and hexane, all of the paraffin series . . . ."[184]

Another of the dictionaries offered by lessee-producers was cited in *Deep South Oil Co. of Texas* v. *F.P.C.*, 247 F.2d 882, (5 Cir., 1957); Cert. Den., *Humble Oil & Refining Co.* v. *F.P.C.*, 355 U.S. 930, 2 L.Ed.2d 413, 78 S.Ct. 410.

> "Petitioner also insists that the casinghead gas which it sells is not 'natural gas' within the meaning of the Act. For answer we deem it sufficient to say that there is nothing in the general language used in the definition of 'natural gas,' quoted above, which suggest that a special or narrow or unnatural definition was meant. Boone's Petroleum Dictionary (1952) defines natural gas as *a mixture of gaseous hydrocarbons found in nature.*" 247 F.2d at 888.

The Boone definition is identical with the 1914 U.S.G.S. definition. The Natural Gas Act, 15 U.S.C. § 717 et seq., is of little assistance. It defines natural gas simply as "either natural gas unmixed, or any mixture of natural and artificial gas." 15 U.S.C. § 717(a).

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[182] LPX 241, 242.

[183] Ibid.

[184] Ibid.

The helex parties counter with their own definition of "Natural gas of commerce . . . [as] a hydrocarbon mixture generally containing other gaseous substances, some of which are inflammable, some non-inflammable, and others corrosive in their natural and combustion states." [185] The helex group likewise responded with witnesses also of long familiarity with the petroleum producing and transporting industry, who had never heard of the lessee-producers' alleged industry usage.[186]

In dealing with similar claims regarding the leases, we found that no such usage existed. For the same reasons, we must reiterate that finding here. The term "natural gas" came into existence, it was testified, to distinguish or differentiate fuel gas discovered in underground reservoirs from artificial or manufactured gas, the former having approximately twice the heating value and efficiency of the latter. As we stated before, there is no gas naturally occurring in the entire Hugoton area which consists solely of hydrocarbons, and hence, which would conform to the alleged usage.

The Btu clauses provide the core of the lessee-producers' second argument that only heat-producing hydrocarbons are conveyed under their gas purchase contracts. They

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[185] Helex Ex. 275. See also a joint publication of the American Gas Assoc., American Petroleum Institute and the Canadian Petroleum Association concerning reserves of natural gas in the United States and Canada, dated December, 1966, which states as follows:

> "For the purpose of the committee report, natural gas is defined to be a mixture of hydrocarbon compounds and small quantities of various non-hydrocarbons existing in gaseous phase or in solution with oil in natural underground reservoirs at original reservoir conditions. The principal hydrocarbons usually contained in the mixture are methane, ethane, propane, butanes and pentanes and typical non-hydrocarbon gases which may be contained in reservoir natural gas are carbon dioxide, hydrogen sulphide, nitrogen . . . ." LPX 239.

[186] Tr. 48:4580; 56:5327.

characterize these clauses as the "tool . . . developed by the pipeline companies and by the industry as a whole to accommodate the needs and desires of the pipelines for merchantable gas and to pay only for the hydrocarbons which they received from the producers." [187] In sum, it is argued that pipeline companies purchase not natural gas, but energy, that the energy of natural gas derives solely from the gaseous hydrocarbons, and that Btu clauses are the means provided to conform payments to the energy content of the gas delivered.

Pipeline companies respond that they buy and pay for volumes of gas as produced from the well, without regard to its constituents. They point out the limited operation of Btu price adjustments in purchases by each of the plaintiff pipeline companies. For example, of Northern's total 1966 purchases of 195 billion cubic feet of gas, 12 billion, or 6.4%, was subject to Btu penalties for low Btu yield. Of purchases from the Kansas Hugoton, 7.2% was adjusted and in the Guymon Hugoton field, one per cent. Of Cities' total gas purchases in the Hugoton area, Btu penalties were invoked on less than six per cent, and this adjustment, it was testified, was limited to gas purchased from Pan American, which is produced from the so-called "C" acreage in the Kansas Hugoton.[188]

Pipeline companies dispute the argument that inert constituents of the stream are valueless. Indeed, they assert that the inerts are necessary for them to comply with their FPC gas tariffs. The Panhandle tariff provides the following limitation on Btu content:

> "2.2 Heating Value. Gas delivered by Seller shall not have a total heating value above one thousand fifty (1050) or below nine hundred fifty (950) British thermal units per cubic foot." [189]

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[187] Tr. 43:4256.

[188] Tr. 52:4959-4960.

[189] LPX 195; Helex 101; second revised sheet No. 34.

The Cities tariff provides thus:

> "2. QUALITY
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> The natural gas supplied hereunder shall be of a merchantable quality and shall have a system wide weighted average total heat content of not less than nine hundred thirty-four (934) British Thermal Units per cubic foot saturated with water vapor under the standard measurement next recited. The Company will, however, endeavor to maintain as nearly as possible a system wide weighted average total heat content of nine hundred eighty-three (983) British Thermal Units per cubic foot . . . ." [190]

The Northern tariff provides as follows:

> "2.2 Heating Value. The heating value of the natural gas received by Northern from its sources of supply may vary, but it is expected that the gross heating value of the gas delivered will not be less than 975 nor more than 1025 Btu per cubic foot. However, if in any month the arithmetic average of heating values recorded hourly by Northern's calorimeter shall be less than 975 Btu per cubic foot, then the volume of gas delivered during such month shall be computed by multiplying the volume computed as provided [herein] . . . by a fraction whose numerator shall be such arithmetic average heating value and whose denominator shall be 975.X" LPX 191, Orig. Sheet No. 128.[191]

The upper limit is partially, at least, a safety precaution. Delivery of a richer gas than the burner is set for may result in incomplete combustion, smoke, soot, and toxic gases. Any gas in the Hugoton area would yield over

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[190] LPX 193, Orig. Sheet No. 25.

[191] LPX 191, Orig. Sheet No. 128.

1,050 Btu's (per cubic foot) if all inerts were removed.[192] Thus, the inert constituents of the stream, including helium, are necessary to enable it to comply with its tariffs and to market natural gas thereunder.

Further, the pipelines point out that so long as gas is above the tariff Btu minimum, they realize greater gross revenue from delivery of a lower rather than a higher Btu gas, for the buyer must then purchase a greater volume of gas to obtain the same heat yield. They further point out that the heating value of a gas stream is not directly a function of the inerts contained therein. Thus, of three samples of gas each containing 17.5% inerts by volume, Btu content ranged from 942 to 1005.[193]

Pipelines further point out that both the producing and transportation industries have dealt with gas in its gross volumetric dimensions in numerous ways. Thus, measurement of gas at the point of delivery to pipeline purchasers, whether at the wellhead or elsewhere; reporting of open flow potentials (the gas well can produce against atmospheric pressure); the setting of allowable production amounts by state regulatory bodies; computation of industry taxes, such as gross production, conservation and sanitation; measurement of tailgate deliveries at processing plants; estimation of reserves; and measurement of pipeline deliveries to distributing companies—all are done on a volumetric basis.

Lessee-producers find support for their appraisal of the importance of Btu clauses in two proceedings before the Federal Power Commission. In the first, the Commission dealt with the necessity and propriety of *upward* Btu adjustment clauses. Although penalty clauses appear in gas purchase contracts commencing around 1943, and were approved by the FPC when it assumed jurisdiction over

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[192] Tr. 41:4088.

[193] Helex Ex. 279.

independent producers in 1954, it had not approved upward Btu clauses, which provide premium prices for high Btu gas. In this proceeding, the Commission specifically approved upward adjustment clauses, notwithstanding the fact that their operation would increase the cost of such higher Btu gas above the guideline levels which had theretofore been established. The decision to approve such clauses was grounded not upon any effort to correlate prices to energy content as the subject of the sale, but to provide an economic incentive to producers with high Btu gas to introduce such gas into the pipeline market, without first removing the higher hydrocarbons therefrom.[194] The Commission stated thus:

> "It is no coincidence that, while downward Btu provisions, usually from a 1,000 Btu base, are found generally in all producing areas, the upwards Btu clause has been limited almost entirely to the five pricing areas involved in the instant certificate proceedings. In these or nearby areas considerable amounts of low Btu gas, ranging as low as 830 Btu per cubic foot, have been discovered and made available for the interstate market. It is essential, if this gas is to be brought up to marketable standards, that it be mixed with higher Btu gas—gas which also is present in considerable quantities in the areas, with Btu ranges of up to approximately 1,200 Btu's. It is clear, however, that unless the pipeline is in a position to offer a reasonable premium for the higher Btu gas, the producers will have a strong economic interest to extract the high Btu hydrocarbons from their gas before delivery to the pipeline. . . . Under these circumstances, an appropriate upward Btu adjustment provides the necessary inducement for producers making it possible for the pipe-

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[194] See Opinion No. 464, *Texaco, Inc., et al.*, Dkt. No. G-8087 (LPX 218).

lines to acquire the supply of high Btu gas required for blending without which a large supply of low Btu gas could not be brought into the interstate pipeline system. Accordingly, we hold that the upward c[illegible]uses here in issue are reasonably required by the public convenience and necessity for these areas."

The second proceeding was the Permian Basin area rate proceeding, recently affirmed in toto in *Permian Basin Area Rate Cases*, 390 U.S. 747, 20 L.Ed.2d 312, 88 S.Ct. 1344 (1968). In its opinion[195] the Commission approved price adjustments based on Btu content, fixing an upward Btu adjustment from a base of 1,050 Btu's, and a downward adjustment, or penalty, from 1,000 Btu's. Thus, gas with a Btu content of less than 1,000 Btu per cubic foot must be sold at a price proportionately lower than the applicable area maximum, and gas with a Btu content of more than 1,050 Btu per cubic foot may be sold at a price proportionately higher than the area maximum. Within the 50 Btu range, no adjustment is made. The following language from the Commission's opinion is pertinent:

"The importance of quality standards as an integral part of our ceiling price becomes readily apparent if it is recognized that gas is purchased for its energy. The price of gas cannot be related to volume alone but must be related to units of energy free of impurities and sufficiently compressed to enter the pipeline if it is to serve as a mechanism to assure just and reasonable rates."[196]

"Looking to the future, however, we believe that it is important that we implement the general prin-

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[195] Excerpted in LPX 219.

[196] LPX 219, p. 95.

ciple that Btu adjustment provisions 'are in the public interest' advanced in our recent decision in Texaco, Inc., Opinion No. 464 (decided June 10, 1965). While Btu adjustments have not played a major role in the Permian Basin in the past we believe it important that our price for new gas-well gas reflect the energy content of the gas, which in reality is what the consumer is purchasing." [197]

Natural gas is sometimes sold on an energy basis, that is, at a given price per 100,000 Btu's (a therm), and not per Mcf. When gas is purchased on this basis, the contract says so. Such sales are not common. Northern has two contracts in the State of Kansas for direct sales of gas (not for resale) on the therm basis. Northern sells gas under two additional contracts containing Btu adjustment clauses above and below 1,000 Btu. These sales comprise only two percent of Northern's total sales. All other sales are made on a volumetric basis subject to the tariff Btu minimum of 975.

Cities likewise has two contracts, both with one customer, in which gas is sold at a given price per million Btu's. A number of early gas sales contracts between Panhandle and various companies, frequently distributing companies, provided for the sale of gas in both volumes and Btu equivalents.[198] Panhandle's original tariff filed with

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[197] LPX 219, p. 99.

[198] See, e.g., a contract dated August 31, 1935, between Panhandle and Detroit City Gas Company, at page 3:

"• • • seller agrees to sell and deliver to buyer, and buyer agrees to buy from seller, all of the natural gas requirements of buyer for the distribution and sale to any and all of its present and future customers and for its own use but not in excess of 90 million cubic feet, or its equivalent 912,000 therms per day, which represents all of the gas seller now believes it can safely contract to furnish buyer at this time." Helex 99, part 3.

the FPC provided that the unit of gas delivered thereunder would be the therm.[199] The current tariff provides that the "sales unit of the gas deliverable by Seller to Buyer shall be one thousand cubic feet (MCF) . . . ."[200] Thermal content is now but a specification of quality.

Sales, however, are still made on a therm basis by some companies.[201]

When gas is sold on a therm basis, the argument is plausible that the buyer purchases only energy. In the purchase of natural gas for resale in interstate commerce, under contracts such as those before us, we cannot but conclude, however, that pipelines purchase not energy, but fuel, which is measured and purchased on a volumetric basis. We cannot so override the plain language of contracts providing for the purchase of *gas* so as to find that the parties were dealing in energy, or British thermal units, alone.

Thirdly, lessee-producers argue that even if the gas purchase contracts be construed to convey the entire stream, the price paid thereunder cannot, as a matter of law, have

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[199] Helex 100, part 2.

[200] LPX 195, Orig. Sheet No. 35.

[201] One witness testified before the FPC in the Texaco, Inc., proceeding concerning Btu price adjustment clauses, as to the prevalence of the practice:

> "Question: Have you found tariffs which are not on a volumetric basis?
>
> "Answer: Yes. In the past, many of the pipeline companies sold the gas at the city gate on a therm basis but most of the companies have now changed to an M.c.f. sale basis with specific heating value specifications.
>
> "Natural Gas Pipe Line Company currently delivers gas on a therm basis to its distributing company customers. Moreover, a number of distributors sell to their customers on a therm basis or M.c.f. with b.t.u. adjustment basis." [Tr. 49:4722].

included payment for helium. The parties have stipulated that helium-bearing natural gas delivered to Cities Service Gas, Northern Natural Gas, and Panhandle from which helium is subsequently extracted is gas purchased for resale in interstate commerce, that all natural gas purchase contracts and amendments thereto between lessee-producers and Cities Service Gas, Northern Natural Gas, and Panhandle are filed with the Federal Power Commission as part of FPC Rate Schedules under the Natural Gas Act, as amended, 15 U.S.C. § 717, et seq., and that all payments made by these three pipeline companies to lessee-producers are at rates established or permitted to be paid by the Federal Power Commission.[202]

Since June 7, 1954, these sales by lessee-producers to pipelines have been regulated by the Federal Power Commission under the Natural Gas Act, under *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794 (1954), wherein the Court held that the Commission's jurisdiction extended "over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company" 347 U.S. at 682, 98 L. Ed. at 1047-48. Later that year, following that decision, the Commission ordered that all independent producers so engaged on or since June 7, 1954, file with the Commission rate schedules consisting of the "basic contract and all supplements or agreements amendatory thereof . . . showing the service to be provided and the rates and charges . . . applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission."[203] An independent producer is defined as "any person as defined in the Natural Gas Act who is engaged in the production

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[202] Pre-Trial Order, p. 12 ¶¶ C, D, E.

[203] 18 CFR § 154.93.

or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce." [204]

No sale may be made by a producer of natural gas in interstate commerce for resale unless there is on file with the Commission a certificate of public convenience and necessity authorizing the sale, and a rate schedule covering that sale, and no payment may be received except at the effective rate on file.

From 1954 through 1960, the Commission attempted rate regulation of independent producers on the basis of conventional company-by-company, sale-by-sale, utility regulation.[205] In 1960, the Commission abandoned this method, and undertook rate regulation on a geographical area basis, dividing the country into 23 pricing areas, and assigning to each preliminary prices called "guideline prices," pending final determination of just and reasonable rates for each of these areas. The prices thus set constituted maximum prices for each area.

These guidelines were applied to rates in the following manner. If a rate increase was filed by the parties to a gas purchase contract which did not increase the rate above the area guideline, the new rate would be approved automatically. If the new filed rate was higher than the guideline, the increase would be suspended and an investigation commenced. Thus, the contract price in some instances may exceed the FPC-approved service rate, where the contract price exceeds the guideline prices and has been suspended pending investigation.

The Commission is also charged with rate regulation of pipeline companies, which is based on conventional public utility regulation, the basic principle being "to prescribe

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[204] 18 CFR § 154.91(a).

[205] Tr. 73:6937.

rates which will give the company the opportunity to generate revenues sufficient, after meeting all reasonable operating expenses, depreciation and taxes, to yield to the company profits . . . roughly comparable to those of companies engaged in comparable risks."[206] The sum of these expenses, depreciation, taxes, and return on investment, constitute a company's cost of service, after recovery of which the company earns a profit. A pipeline may engage in what are described as non-jurisdictional activities, such as the extraction of hydrocarbons, which the Commission is not empowered to regulate. Thus, the sales of the products of such extraction are not subject to Commission rate regulation. However, the earnings realized from such non-jurisdictional activities are credited to the jurisdictional income of the company, or against its cost of service, in computing the profits realized by the company. Inasmuch as the earnings from the sale of hydrocarbons are proportionately greater than the earnings from the sale of natural gas, the earnings from non-jurisdictional hydrocarbon extraction operate to reduce the rates it will be permitted to charge for jurisdictional sales of natural gas. Stated otherwise, profits from hydrocarbon extraction are credited to the profits realized from natural gas sales, and permit a reduction in gas rates, with the end result that the returns to the pipeline from non-jurisdictional activities are reduced to the average earned on the whole of its system.

In drafting the Helium Act Amendments of 1960, it was thought that absent express provision, revenues from helium activities accruing to any pipeline company or other company subject to the rate-making jurisdiction of the Federal Power Commission would be similarly treated, and it was anticipated that industry participation would be more difficult to promote if participating companies could anticipate only a public utility rate of return on its investment. Accordingly, to provide an economic incen-

[206] Tr. 73:6912-13.

tive to industry to undertake helium conservation, the Department of the Interior proposed to exempt helium extraction operations from the provisions of the Natural Gas Act and the jurisdiction of the Federal Power Commission.

Section 11 of the 1960 Amendments provided accordingly:

> "The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis." 50 U.S.C.A. § 167(i).

During committee hearings on this section, FPC representatives objected that it jeopardized Commission jurisdiction over any stream of natural gas containing helium. It was made clear in both the hearings and floor debate that FPC jurisdiction over natural gas containing helium was to be unaffected by the amendment.[207]

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[207] This section was not in the proposals first submitted to Congress in 1958. It appeared first in the redrafted proposals submitted in 1959, in the following form:

> "SEC. 9. The provisions of the Natural Gas Act . . . shall not be applicable to the sale, extraction, processing, trans-

No party here seriously contends that Section 11 strips the Commission of all its power to determine the rates at which helium bearing natural gas may be sold by lessee-producers to pipeline purchasers, or the rates at which pipeline companies may sell this gas for resale. There has been no change in the methods of Commission regulation of independent producers as a result of the Helium Act Amendments.

The question is whether or not although lessee-producers have contracted for the sale of the entire gas stream, they have received any payment for the helium constituent thereof since 1960. This question is premised on the

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portation or storage of helium, either prior to or subsequent to *its separation* from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and, in the determination of rates under Sections 4 and 5 of the Natural Gas Act as amended, the income received from such helium shall not be considered and no exploration, production, gathering, extraction, processing, compression, transportation, storage or other costs which were or would have been incurred in the absence of the extraction of the helium shall be allocated or assigned to the helium." [Italics supplied.]

In response to the FPC fears for its jurisdiction over the entire gas stream notwithstanding helium contained therein, the language italicized was deleted, and the language "the separation of such helium" inserted. During debate on the Senate floor, Senator Carroll stated thus:

> "I wish the RECORD to be crystal clear, so that any court which reads this RECORD will know what is the specific legislative intent, namely, that we are not exempting helium-bearing gas from jurisdiction by the Federal Power Commission under the Natural Gas Act. There can be no question about that. For anyone who reads the hearings of the Senate Committee, the report of our committee, my own individual views, which are a part of the Interior Committee reports, and, I hope, the debate this evening."

106 Cong. Rec. 18603 [Helex 281, part 9.]

contention that the Helium Act Amendments of 1960 oust the FPC of rate-making jurisdiction as to all sales of helium, ". . . either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, . . ." [208]

The section was manifestly intended to give any company which is otherwise regulated by the Federal Power Commission complete freedom from Commission regulation in any transaction for the sale, processing, transportation of helium, either commingled with the stream or separate therefrom.

Section 15, 50 U.S.C. § 167m, of the Amendments, provides:

> "It is the sense of the Congress that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits, through the administration of this chapter, a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities."

The pipeline companies argue that Section 11, making the Natural Gas Act inapplicable to the "sale, extraction . . . of helium either prior to or subsequent to the separation of *such* helium," applies only to transactions respecting the sale of helium as a separate commodity, and not merely as a component of an entire gas stream. Stated otherwise, it is argued that Section 11 applies only to such helium as is specifically and/or separately the subject of a sale.

"The regulatory system created by the [Natural Gas] Act is premised on contractual agreements voluntarily de-

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[208] *Ibid*, Sec. 9 became Sec. 11. See 50 U.S.C. § 167.

vised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." *Permian Basin Area Rate Case*, 390 U.S. 747, 20 L. Ed. 2d 312, 367, 88 S. Ct. 1344 (1968). We have held that lessee-producers contracted to sell, and pipeline companies contracted to purchase, the entire gas stream with all its components, except those expressly reserved.

We think it cannot be disputed that one purpose of Section 11 was to permit parties otherwise subject to FPC regulation to contract for the sale of helium whether commingled with the natural gas stream or not, without FPC regulation. That right is not in issue here, as the pipeline companies point out. The only question is whether the section entitled vendors of helium-bearing natural gas to recover from their purchasers a sum for helium sold under their respective rate schedules above that contractually agreed upon by the parties prior to 1960 as the price of the entire stream.

The argument for lessee-producers is appealing. The Helium Act Amendments created a market for helium which did not theretofore exist. The United States became a major potential purchaser of helium, to supply a newly created demand for helium to meet not only current, but future needs. Prior to 1960, pipeline companies had realized nothing out of helium. For many years it had been a useful, scarce and wasting natural resource. It was not one of economic importance to the pipeline companies, however, who regarded it as a valueless diluent of the heating value of the stream until a market was created. The passage of the Act created a market for helium, and caused it to become a national resource of major economic importance, solely by virtue of the United States' interest in conserving and purchasing it. Certainly, one effect of Section 11 is to permit contracting parties to recognize its newly acquired economic importance in future contracts for its sale, without regard to FPC regulation of natural

gas prices. We do not think that Section 11 was intended to relieve all lessee-producers selling helium-bearing gas from contracts which they might regard as unfair, simply because of a subsequently created market for a constituent of the gas stream which they sell. We must conclude that Section 11 of the Helium Act Amendments does not alter the scope of the gas purchase contracts, does not strip the helium from the gas stream for which the stated price is being paid, and does not *require* that persons contracting for the sale of gas contract separately for the sale of the helium constituent. It merely permits them to do so, and when they have not, the contract must stand as it is written.

F.P.C. Primary Jurisdiction

A question remains with respect to the alleged primary jurisdiction of the Federal Power Commission over the matter involved here. Both Northern and Cities moved to stay proceedings in their respective cases herein, pending determination of certain issues by the F.P.C.[209] Northern proposed that the court refer two issues for Commission determination; that is, whether the lessee-producers' rates on file with the Commission apply to the entire gas stream sold and delivered under lessee-producers' sales contracts, and whether landowners' royalties must be computed only upon those filed rates.

The Cities' issue, already pending before the Commission in designated proceedings, was "whether . . . landowners and producers . . . can lawfully collect more for the gas produced from their well and sold in interstate commerce than that permitted under the defendant producers' F.P.C. Gas Rate Schedules."[210]

The court overruled these motions on the grounds that the issues in the pending F.P.C. proceedings were neither

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[209] Dkt. Nos. 1209, 1211, KC-1969.

[210] Dkt. 1211, KC-1969.

the same nor germane to those herein; that no determination of the issues in those cases would materially assist in the instant cases; and that under Section 11 of the 1960 Helium Act Amendments no issue respecting helium *could* lie within the jurisdiction of the F.P.C.[211]

The court has previously ruled, p.p. 30-32, supra, that there is no jurisdiction of landowners' cross-claims for royalty payments from lessee-producers because such claims do not affect their right to participate in the interpleaded fund. Both Cities and Northern have persisted in the view that because helium is in the gas stream, that the Natural Gas Act gives them primary jurisdiction of these proceedings and have relied in part to sustain their position upon *J. M. Huber Corporation* v. *Denman*, 367 F. 2d 104 (5th Cir. 1966). The lower court in that case held that plaintiff lessors were entitled to royalties computed on the basis of actual "market value" of the natural gas, whether or not such value conformed to the rates being collected by the lessee-producer defendant, the Huber Corporation, which rates are regulated by the F.P.C. This ruling was affirmed in *J. M. Huber Corporation* v. *Denman, supra.* However, the court remanded the case for further proceedings with the following direction:

> "Specifically, the District Court should defer further action including fixing of the actual 'market price' pending invocation by the parties of a ruling by the FPC: (1) (a) as to the jurisdiction of the FPC over payment for royalties for gas sold for resale and transported in interstate commerce, (b) the status of a royalty interest owner's transaction as a sale under the Act where incident to a sale for resale and transportation in interstate commerce, (c) the status of the royalty interest owner's transaction in this case as a sale under the Act. . . ." 367 F. 2d at 121 [Footnote omitted.]

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[211] Dkt. No. 1225, KC-1969.

Plaintiffs thereupon petitioned the F.P.C. for a declaratory order that the Commission does not have jurisdiction over gas royalties paid them by the Huber Corporation.[212]

Meanwhile, royalty holders commenced lawsuits in Kansas courts seeking, as in *Huber, supra,* recovery of royalties computed not upon the F.P.C.-approved rates collected by their producer, Mobil, but upon the market value of gas produced and sold by it. Mobil thereupon invoked the primary jurisdiction of the Commission, seeking a determination that it does have jurisdiction over royalty payments to lessors.[213]

The Commission consolidated these two proceedings with one other,[214] which raised an identical basic question:

> "[C]an persons contractually entitled to royalty payments for natural gas sold for resale in interstate commerce be classified as 'natural-gas companies' within the meaning of the Natural Gas Act and subject to the jurisdiction of the Commission." [215]

The Commission defined the scope of the hearing to be held thus:

> "The hearing in these cases shall be confined to resolving whether the Commission has jurisdiction over a landowners' royalty interest in natural gas leaseholds and, if answered in the affirmative, how such jurisdiction should be implemented. • • • •

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[212] William Harvey Denman, Trustee v. J. M. Huber Corp. Dkt. No. RI67-113.

[213] Mobil Oil Corp. v. Carl F. Matzen, et al. Docket No. RI67-114.

[214] Western Natural Gas Co. v. Elmer Hennigh, et al. Docket No. RI67-310.

[215] Dkt. No. 1210, Ex. C, p. 2, KC-1969.

"The examiner will consider the questions raised in Docket No. RI67-114 with respect to helium only as the facts on this subject bear upon the royalty interest of landowners in natural gas leaseholds. These will in no way require consideration of any question foreclosed to this Commission's jurisdiction by the Helium Act. (74 Stat. 918) 50 U.S.C. Sec. 1671.

"Contractual issues relating to the specific royalty payments to which any particular lessor is entitled under this lease agreement will not be the subject of this hearing."[216]

So far as appears, helium was mentioned in only one of the three consolidated cases, Mobil Oil Corp. v. Matzen, et al. Mobil alleged that as lessee of Matzen, et al., it produced, sold and delivered all gas as entitled under its leases, excepting that it did not sell helium to its gas purchasers. Nowhere did it appear that the lessors relied upon the presence of helium in the natural gas as a factor in establishing market value.

In *J. M. Huber* v. *Denman, supra,* the Fifth Circuit referred to the F.P.C. the question of its own jurisdiction over royalty payments. Under Section 11 of the 1960 Helium Act Amendments, even that ground for referral is lacking, for thereunder the Natural Gas Act "shall not be applicable to the sale . . . of helium . . . [even] prior to . . . the separation of such helium from the natural gas with which it is commingled, whether or not the . . . Act [applies] to such natural gas. . . ." Thus, even if the Commission should assume jurisdiction over royalty payments, it would appear that it could not regulate any royalty demanded by a lessor attributable to helium alone.[217]

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[216] *Id.* at p. 3.

[217] See royalty provision in Shamrock Ex. 1, lease 103/4530.

The doctrine of primary jurisdiction is explained thus in *United States* v. *Western Pac. Railroad Co.*, 352 U.S. 59, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956):

> "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties . . . . 'Primary jurisdiction,' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. . . .
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> "No fixed formula exists for applying the doctrine . . . . In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. . . . In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions . . . . More recently the expert and specialized knowledge of the agencies involved has been particularly stressed . . . The two factors are part of the same principle '. . . that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. . . .' " 352 U.S. at 63, 1 L. Ed. 2d at 132.

It is true that the Commission has long regulated the sale of natural gas for resale in interstate commerce, and that such gas does contain helium. However, the questions

here have not raised issues of fact "not within the conventional experience of judges," or questions requiring or warrantying the exercise of administrative discretion. The issues of whether title to helium passed under the leases, and whether royalties paid thereunder constitute payment for helium, raise factual and legal questions judicially determinable. Moreover, whether the Commission's jurisdiction extends to royalty payments received by lessors does not affect whether the lessors, or landowners have in fact conveyed the helium contained in that natural gas. If they have, or have not, it is not because of any jurisdiction, or lack of it, in the F.P.C. over royalty payments received by landowners.

Unjust Enrichment

Lessee-producers and landowners also claim the funds on the ground of unjust enrichment. The arguments previously considered constitute the premise by which they seek to enforce this claim.

They point out that when most of the leases and gas purchase contracts were executed, helium was regarded as only an inert diluent of the stream without value in itself, and that landowners, pipeline purchasers and lessee-producers had no reason to anticipate that Congress would suddenly recognize it as a valuable natural resource and create a major new market for it. They argue that they are "economically powerless" to extract it prior to delivery of the gas stream to the pipelines, pointing out that they can not, under the rules and regulations of the F.P.C., discontinue or abandon delivery of the stream. They justly regard the money received by the extraction companies from the United States as a "benefit" to the former, but complain that it accrues to those companies not at the expense of the United States, but to the expense and detriment of themselves, the landowners or the lessee-producers.

The unjust enrichment claim is based fundamentally upon alternative premises: 1) that title to helium did not pass under the leases or gas purchase contracts and that the extraction companies have converted it to their own use and benefit; and 2) that the pipeline purchasers paid only for hydrocarbons, and paid no consideration for helium, and now having sold it for valuable and substantial consideration, must respond from those proceeds to their vendors, for the fair market value of said helium.

We have already disposed of both premises. We have held that title to helium passed to the pipeline purchasers under their leases and gas purchase contracts, and secondly, that payment for gas under those contracts was not limited to the hydrocarbon portion alone, but was intended and received as payment for all constituents of the entire stream as produced from the well.

Landowners and lessee-producers find further support for their unjust enrichment argument in an alleged privileged position enjoyed by members of the helex group ever since the inception of the helium program. They argue that ever since Dr. Seibel's report in 1956, proposing the construction of extraction plants on large-volume pipelines leading from the Hugoton area, the government program has been oriented to pipeline extraction plants, without regard to the ownership of helium and that independent producers were never seriously considered as probable processors of helium. It is further argued that the contracts ultimately executed by the extraction companies insulate the latter from virtually all economic risk, providing guaranteed minimum sales for a 22-year period, at a guaranteed price, limited liability in the event of failure of title to helium, plus the realization of collateral economic benefits, such as decreased transportation costs of a gas stream from which inerts have been removed, and the removal of greater quantities of liquid hydrocarbons made possible by the extraction process.

The foregoing contract features and collateral economies would inure to the benefit of *any* party contracting with the United States in the conservation program. Assuming, *arguendo,* the contracts advantageously minimized the risks of undertaking helium extraction for the conservation program, and afforded participants favorable economies in other respects, these factors do not make the consequent enrichment of corporate coffers unlawful or inequitable as to third parties in any manner cognizable at law.

In preparing cost build-ups as a basis for negotiating the helium purchase contracts, the Bureau included as one of the contractors' costs, two dollars per Mcf for recoverable helium contained in natural gas processed for extraction. It said:

> "The initial unit price will be a negotiated price. On our side of the table, we will calculate what we consider to be a fair and reasonable price by first computing the estimated unit cost of extracting helium in a Government plant under similar circumstances, and then adding an amount to cover taxes, insurance, and any other costs applicable to a private plant, plus a 6½ per cent annual rate of return, after taxes, on the undepreciated plant investment . . . In this calculation, we will include as cost items in a Government operation a payment of $2.00 a thousand cubic feet for recoverable helium in the natural gas processed, and an appropriate payment for fuel gas and other gas shrinkage in the plant." [218]

Two views may be taken of this allowance. The Director of the Bureau of Mines justified it to the General Accounting Office as the fair and reasonable value of helium

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[218] LPX 91, App. 33.

in the stream, and a fair estimate of the helium cost the United States would incur in a government-owned plant. The Director wrote:

> "In negotiating prices with the companies, the Bureau considered the helium in the natural gas streams prior to processing to be worth $2.00 a thousand cubic feet. Because the helium content of the gas to be processed by the companies varies from company to company and because 100 percent of the helium in the gas cannot be economically recovered, the equivalent value of the recoverable helium in the natural gas varies from company to company—averaging about $2.30 a thousand cubic feet.
>
> "We considered this as an item of cost in our calculations because in our chosen approach it would have been an item of cost in a Government plant. The basic $2.00 figure is not an arbitrary figure. The Bureau of Mines is presently paying the equivalent of this amount for the privilege of extracting helium from gas supplied by gas companies at the Government's Keyes, Oklahoma and Shiprock, New Mexico plants.* * *
>
> "In view of the foregoing and in the light of abundant testimony by the Bureau of Mines before congressional committees relevant to the importance of helium, it is extremely unlikely that a value lower than $2.00 could be obtained either through negotiation or condemnation. *One might argue that helium currently wasted in fuel gases has no value, but such an argument becomes invalid when someone decides to extract the helium for conservation or sale. We believe the $2.00 figure represents a just and reasonable value for helium in natural gas processed for helium extraction, without regard to who does the processing. . . . Consequently, we did not require*

the companies to show that the $2.00 would be an item of cost, because we do not think it is pertinent." [219]

The Comptroller General viewed this allowance of $2.00 per Mcf for helium as mere profit to the contractors, totalling over the life of the contracts $144 million unjustified costs to the United States and equivalent profits to the contractors over and above the profits already provided in the cost build-up. In his report to Congress he stated:

"On the basis of our review of the Bureau's estimates of the contract unit prices, it appears that the Government will incur unjustified costs of at least $155 million. An equivalent amount will be received by the contractors as profits over and above the $158 million allowed as profits in the composition of prices prepared by the Bureau. Of the $155 million of unjustified costs, $144 million represents special allowance for the helium content in the natural gas . . . . The special allowances were included in the Bureau's initial estimates without establishing that any associated costs would be incurred by the contractors, and the negotiation records do not show that the contractors requested or required the special allowance as an added profit payment for the value of the contained helium. [p. 6]

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"We consider that it was inappropriate for the Bureau to have included in its estimates special allowances of $144 million for an element that was being dissipated when included in the natural gas sold as fuel. [p. 9]. • • •

"The fact that an amount equivalent to the $2 special allowance per MCF had been paid as a fee

[219] LPX 182, p. 7.

> for permitting the Government to extract helium from natural gas at the Keyes plant did not necessarily mean that such amount should or need be paid under an entirely different contract arrangement under which the contractors would otherwise be provided a profit for their participation in the program." [p. 10.].[220]

It would appear that based upon the G.A.O. Report, landowners and the lessee-producers are contending that the extraction companies are being unjustly enriched, the former claiming it to be at the expense of the United States and its taxpayers, the latter deeming it to be at their own expense. The alleged enrichment of the extraction companies does not result from any breach of a legal or equitable duty owing to the lessee-producers or landowners. So far as appears, any profits result solely from the judgment of the Bureau of Mines in its estimation of the amount the Government determined its contractors would require to extract helium and this, in turn, was based upon the estimated cost to the United States to operate its own plants. In *Anderson* v. *Anderson*, 155 Kan. 69, 72, 123 P.2d 315 (1942), the court stated, quoting *University* v. *Forbes*, 88 N.H. 17, 183 Atl. 860:

> "'The doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity. While it is said that a defendant is liable if "equity and good conscience" requires, this does not mean that a moral duty meets the demands of equity. There must be some specific legal principle or situation which equity has established or recognized, to bring a case within the scope of the doctrine.'"

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[220] Comptroller General's Report, "Examination of Procurement of Crude Helium for the Helium Conservation Program under Negotiated Fixed-Price Contracts—Bureau of Mines—Department of the Interior." January, 1963. [LPX 185.]

A benefit is not unjust unless it is unlawful and the injustice must be one for which the law gives redress under its rules. The claim of unjust enrichment can only be made, if at all, by the United States and this it has not done. If the extraction companies are unjustly enriched by the United States, landowners and lessee-producers are not entitled to a share in the funds on the ground that it is at their detriment or expense.

SUMMARY

We summarize our conclusions respecting the claims of landowners as follows:

That landowners in each of the interpleader cases can sue and be sued herein as a single class, that the interests of all members of the landowner class in each case have been adequately represented by those named landowners appearing both individually and as representatives of absent members of each class, and that division of each such landowner class into subclasses is unnecessary to the adequate representation of the absent members of each such class;

That landowners are not barred by either waiver or estoppel from asserting that helium is not conveyed under their oil and gas leases;

That in any oil and gas lease, or lease for gas only, under which natural gas is produced from any field involved herein, which gas is subsequently processed for the extraction of helium, the words "gas" or "gases" are used interchangeably to describe any naturally-formed aeriform substances indigenous to the underlying reservoir, which aeriform substances include helium; and the natural gas stream conveyed under those leases includes, except as reserved, both hydrocarbon and non-hydrocarbon elements and compounds, including helium;

That in these interpleader actions, the Court has no jurisdiction of landowners' claims against their co-de-

fendant lessee-producers, for any separate or additional royalty for the helium constituent of the gas stream;

That the Court further has no jurisdiction to entertain landowners' claims for cancellation of the leases as to helium, for alleged breaches of implied covenants to market helium with reasonable diligence;

That landowners are not entitled to participate in the interpleader funds on the ground that plaintiffs are unjustly enriched at the expense and detriment of said landowners;

That Section 11 of the 1960 Helium Act Amendments did not abrogate the aforesaid leases, insofar as the conveyance of helium is concerned;

That royalty payments for natural gas paid and received by landowners under the lease agreements are not rendered illegal or insufficient as payment for helium because said payments were made by lessee-producers whose rates are regulated and approved by the Federal Power Commission.

We summarize our conclusions respecting the claims of lessee-producers as follows:

That named lessee-producers appear in each of the interpleader cases, both individually and as representatives of the class of lessee-producers described for each case, and that lessee-producers in each case may sue and be sued as a single class;

That defendant lessee-producers are not barred by waiver or estoppel to assert their claims to helium by their conduct respecting the contracts under which they sell and deliver natural gas to their pipeline purchasers, and that interpleading plaintiffs are likewise not barred by waiver or estoppel from asserting that their gas purchase contracts do convey and provide payment for helium;

That the natural gas purchase contracts under which lessee-producers sell and deliver gas to their pipeline company purchasers apply to and convey the entire natural gas stream, except as reserved, and the natural gas stream conveyed under those contracts includes both hydrocarbon and non-hydrocarbon elements and compounds, including helium;

That the parties to these contracts have not by their conduct with respect thereto, either expressly or impliedly amended, reformed, rewritten, or modified those contracts;

That payments received under those contracts by lessee-producers from their pipeline purchasers constitute payment for the entire natural gas stream measured and delivered thereunder, including both hydrocarbon and non-hydrocarbon constituents (including helium) of the stream, except as reserved to the seller;

That payments made and received under those contracts are not, thus, for hydrocarbons alone, or for British thermal units;

That the contracts thus construed are not so unconscionable, or against public policy, so as to be invalid and unenforceable under the circumstances;

That Section 11 of the 1960 Helium Act Amendments did not abrogate those contracts insofar as the conveyance of helium is concerned;

That payment for natural gas made and received under those contracts are not rendered illegal, or insufficient, as payment for helium because said payments are made at rates regulated and approved by the Federal Power Commission;

That no lessee-producer is entitled to recover, as payment for helium, the difference, if any, between any price stated in its natural gas sales contracts, or in any contract price resulting from an arbitration award, and the

FPC-approved service rate being collected, whether the contract price is or is not approved for collection subject to refund;

That lessee-producers are not entitled to participate in the interpleaded funds on the ground that plaintiffs in interpleader are being unjustly enriched at their expense and detriment.

From all of the foregoing conclusions, it follows that the landowners' claims against the United States in Case No. W-3009 and Case No. W-3159 must fail. We have found that the landowners did, in fact, convey to their lessees all rights to helium, except as may be reserved, as a part of the natural gas stream. Lacking title, landowners' claims for conversion of helium under the Tort Claims Act, 28 U.S.C. § 1346(b), must fail. Likewise, based upon the findings herein, their standing to claim a taking of *their* property without just and reasonable compensation, the reverse condemnation claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), must be denied.

Costs

Rule 54(d), F.R.Civ.P., provides in pertinent part as follows:

> "Except when express provisions therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.* * *"

Allowance of costs to the prevailing party is not an inexorable rule, and the Court may, in its discretion, direct otherwise. We think these cases are particularly appropriate for such direction.

The issues which plaintiffs in the interpleader cases raised for determination are of considerable magnitude, both in the numbers of persons affected thereby, and their financial importance to all claimants to the funds. In each of the interpleader cases, plaintiffs have obtained, in net effect, an adjudication that quiets their title to all helium sold to the United States. The possible rights of ownership of helium in other parties was recognized in each of the contracts from which the interpleader funds derive. The financial burden of any adjudication of liability adverse to plaintiffs was minimized by provisions in each contract requiring the United States to reimburse said companies for all amounts paid by them to any third party or parties found to own said helium, to the extent that such payments exceeded approximately three dollars per Mcf of contained helium.

The interpleading plaintiffs, because of their position in the gas industry, are the beneficiaries of a decision of the United States to undertake the necessary conservation of helium. The government enlisted the participation of private enterprise, and interpleading plaintiffs were advantageously circumstanced to so participate. The plan to locate extraction plants on pipelines was formulated within the Bureau of Mines as the most efficient and expeditious means of helium conservation, without regard to possible ownership rights vested in other persons. The helium purchase contracts with the four extraction companies were entered into, certainly, on the expectation that their ownership of helium and extraction rights was complete. Plaintiffs herein have undertaken to secure a final adjudication of those rights, and we think it only just and equitable that those parties bear the statutory costs (see 28 U.S.C. § 1920), and the cost of notice to claimants (as hereafter ordered by the Court), all of which were incurred in obtaining a foreclosure of all other rights of ownership to helium which they sell to the United States.

NOTICE AND JUDGMENT

As stated earlier herein, infra, p. 25, we cannot determine in these cases the res adjudicata extent of the judgments to be entered here. However, it is in the interest of justice and economy of litigation, that the extent of the judgments entered herein be as broad as is constitutionally permissible, and this interest may be materially assisted by notice to all absent members of the classes of landowners and lessee-producers prior to entry of judgment.

Accordingly, within thirty days, prevailing counsel will prepare, circulate, and submit the following, consistent with the views expressed herein:

1. A form of notice to be given absent lessee-producers and landowners;

2. A form of judgment denying landowners' and lessee-producers' claims to the interpleader fund, dismissing, for want of jurisdiction or on the merits, the cross claims and counter-claims of landowners, and permanently enjoining said parties from asserting the claims disposed of in these actions; and further, in the suits against the United States, the motion of the United States for judgment is to be sustained. Such form of judgment shall include provision for taxation of costs in accordance with the Court's views, as expressed herein.

The foregoing findings of fact and conclusions of law are made in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure.

Dated at Wichita, Kansas, this 7th day of September, 1968.

/s/ WESLEY E. BROWN
United States District Judge

APPENDIX E

Opinion and Order of the United States District Court for Kansas Determining Method and Manner for Fixing and Taxing Costs, Filed June 17, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

NORTHERN NATURAL GAS COMPANY, et al, *Plaintiffs*,
v.
RALPH GROUNDS, HENRY HITCH, et al, *Defendants*.

Civil Action No. KC-1969

(Consolidated with Civil Actions Nos.
KC-1945, -46, -47, -48, KC-1980, W-3009
and W-3159)

MEMORANDUM AND ORDER DETERMINING METHOD AND MANNER FOR FIXING AND TAXING COSTS

In the Court's Memorandum Decision of September 7, 1968, as corrected October 14, 1968, 292 F. Supp. 619, 688, it was ruled upon equitable considerations that prevailing plaintiffs should bear the statutory costs in these actions. Thereafter on April 15, 1969, journal entry of judgment was filed in accordance with the decision of this Court, taxing costs to named plaintiffs, the helium extraction companies, and pursuant to order, those parties seeking to tax costs have filed itemized and verified bills, and hearing was held on May 23rd for the purpose of determining what costs are within the language of the Court's decision. Thereafter lessee-producers filed Motion to Defer Settlement of Bills of Costs pending final determination of the appeal in this case, and plaintiffs, the Helex group, have filed Brief in opposition to any postponement of the cost issue.

The Court has determined that all pertinent issues should be settled and finally resolved upon appeal in this

case, and that in view of the present indication of the costs in this action, a determination of the basis upon which this Court will decide that issue should now be made. Accordingly, the Motion of Lessee-Producers to Defer Settlement of Bills of Costs is overruled except insofar as the Court's fixing of a dollar amount is required. The dollar amount will be determined after the appeals now pending in accordance with the views expressed herein unless otherwise modified by the appellate courts.

It seems unnecessary to again observe that these consolidated actions were most unusual in scope, both in the nature of the subject matter and the vast number of persons who were and will be affected by the decision of this Court. It was estimated that there were approximatey 30,000 persons who receive income from the production of helium-bearing gas by virtue of ownership of land, mineral interests and/or royalty interests. 292 F. Supp. at 633. The actions have required lengthy, extensive and costly discovery proceedings, many hours of legal research and numerous court appearances apart from actual trial. In reviewing the files for the purpose of making a decision upon costs, a mere reading of the 2,156 Docket entries attests to the staggering scope of these actions. In addition, the Court notes that 32 days of court hearings were had, apart from the actual trial, which covered approximately 43 days. The testimony of 68 persons was taken by deposition, and during trial the Court heard testimony from 28 witnesses, in addition to transcribed testimony of 55 others presented by deposition. A total of 1,610 Exhibits were introduced into evidence, and many of these proved exceedingly costly to research, prepare and assemble in a form which would be useful to the Court.

The Court has said before and will say again that it has been impressed throughout these proceedings with the high quality of counsel's representation of all parties.

Without their aid and the thorough preparation and presentation of evidence on behalf of all interested persons, the Court would have been greatly hampered in reaching the decision which it believes was required under the law. With respect to representation in the class actions, the Court can only repeat its observation at 292 F. Supp. at 635:

> "... the representation by counsel for both the landowner and lessee-producer classes has been of the highest quality. Their presentation reflected diligent, careful and incisive attention to the interests of the class. In addition to the most careful investigation by deposition, interrogatories and other discovery of facts, they have explored fully, in evidence, briefs and arguments, what must surely be every conceivable theory which the facts could possibly support."

By our findings of the capable representation of the various classes, we do not infer that the interpleaders were not equally represented. The services of the attorneys and exhibits furnished by the Helex group were obviously beneficial to the integrity of the fund and to the Court.

After consideration of the actions as a whole, with attention to the briefs and arguments of the parties lately submitted with reference to proper taxation of the costs herein, the Court makes the following findings on the costs issue. We are of the opinion that all costs should be taxed against the "fund" as defined by the Court in these cases. In arriving at this determination, the Court has been guided principally by a consideration of whether or not a particular expense has been of real aid and assistance to the Court and parties in presentation of the case. In this connection, the Court has applied principles and considerations discussed in the following cases:

> *Bank of China* v. *Wells Fargo Bank & Union Trust Co.* (9th Cir. 1953) 209 F. 2d 467

City of Wewoka, Okla. v. *Banker* (10th Cir. 1941) 117 F.2d 839.

O'Hara v. *Oakland County* (6th Cir. 1943) 136 F.2d 152.

Clark v. *Hot Springs Electric Light & Power Co.* (10th Cir. 1935), 76 F.2d 918, cert. denied, 296 U.S. 624, 80 L. Ed. 443.

Farmer v. *Arabian American Oil Co.*, 379 U.S. 227, 13 L. Ed. 2d 248 (1964)

Sprague v. *Ticonic National Bank*, 307 U.S. 161, 83 L. Ed. 1184 (1939)

Fleischmann v. *Maier Brewing Co.*, 386 U.S. 714, 18 L. Ed. 2d 475.

United States v. *Arizona Canning Co.* (10th Cir. 1954), 212 F.2d 532.

United States v. *Kolesar* (5th Cir. 1963) 313 F.2d 835.

Twentieth Century Fox Film Corporation v. *Goldwyn* (9th Cir. 1964), 328 F.2d 190, 222-224, cert. denied, 379 U.S. 880, 13 L. Ed. 2d 87.

Euler v. *Waller* (10th Cir. 1961) 295 F.2d 765.

Brisacher v. *Tracy-Collins Trust Company*, (10th Cir. 1960) 277 F.2d 519

Advance Business Systems & Supply Co. v. *SCM Corporation*, (D.C. Md. 1968) 287 F. Supp. 143, 161-166.

Bank of America v. *Loew's International Corp.* (S.D. D.C. N.Y., 1958) 163 F. Supp. 924.

Cf. *In re Estate of Sowder*, 185 Kan. 74, 86-87, 340 P. 2d 907 (1959).

See also, *Peck, Taxation of Costs*, 37 F.R.D. 481, 43 F.R.D. 55, 6 *Moore's Federal Practice* § 54.77(2).

A. Items to be Allowed and Taxed

1. Costs of all parties for docket fees and costs of briefs as provided in 28 U.S.C. § 1923.

2. Costs of all parties under 28 U.S.C. § 1920 for fees of the Clerk of this Court and Marshal, as provided by 28 U.S.C. §§ 1914, 1917, 1921.

3. Cost and fees of Court Reporter for original copy of the trial transcript. In addition, cost of four (4) copies of the trial transcript will be allowed, one copy being for the use of the Court, with the remaining three copies provided for the use of the Landowners, the Lessee-Producers, and the Helex group.

4. Cost and fees of Court Reporter for original copy of transcript of pre-trial conferences. In addition, cost of four (4) copies of such transcripts will be allowed, as provided in ¶ 3 above.

5. Cost and fees of Reporters for original transcripts of all depositions, whether or not such depositions were received in evidence. In addition, cost of four (4) copies of such depositions will be allowed, as provided in ¶ 3 above.

6. All printing costs of all parties for briefs, motions, and orders filed in this Court.

7. All costs of all parties for preparation, mailing and and publication of notices required by order of the Court.

8. Witness fees for all parties as provided by 28 U.S.C. § 1821. This shall include all witness in attendance upon this Court, or appearing before any person authorized to take his deposition, said fees to be paid at the rate of $4.00 per day, and 8 cents per mile for going from and returning to his place of residence. Persons who attend from points far removed from their residence shall be entitled to an additional allowance of $8.00 per day for

subsistence. Mileage costs shall be allowed for actual mileage, and are not to be limited to a 100 mile area surrounding Wichita, Kansas.

Costs and expenses of expert witnesses shall not be allowed unless prior approval of this Court was obtained prior to such testimony.

9. Costs and fees of all parties for exemplification and copies of all papers and documents necessarily obtained for use in these actions. This shall include cost of furnishing lease information required by the Court and providing lists of names and other expenses particularly connected with representation of absent parties in the class actions.

10. Costs and fees incurred by all parties in preparation of exhibits. These costs shall include all necessary expense of research, and assembly as well as all expense of photostatic copying or exemplification of charts and drawings in connection therewith, and may include such clerical expense as is directly related to such preparation.

B. Items Which are Specifically Disallowed

1. Cost of expert witnesses expended without prior approval of the Court.

2. All personal expenses of counsel in attending depositions, searching records, or in preparation of trial.

3. Telephone and postage expense, with the exception of postage expense directly incurred in connection with notices in class action suits, incurred pursuant to Order of the Court.

4. All clerical and overhead expenses, except insofar as such expense may be directly related to preparation of exhibits and cost of notices in the class action suits, incurred pursuant to Order of the Court.

5. Cost of legal services of Kline & Tinker, F.P.C. "specialists", incurred in connection with witness Connole.

The Court has determined that the costs outlined in general terms in Section A above, shall be settled and allowed to all parties in this action at the conclusion of appellate review, the same to be taxed against the fund in controversy. In addition to these costs, the Court has further determined that reasonable attorneys' fees shall be allowed to the attorneys for the parties in the actions, the same to be likewise taxed against the fund. Without fixing a dollar amount at this time, it is the intention of the Court, and it is so determined, that three separate reasonable attorney fees shall be set, to be awarded in a lump sum to each of the three groups of interested persons—that is, one total fee to attorneys for the landowners, one total fee to attorneys for lessee-producers, and one total fee for attorneys for the Helex interests. It will be the further order of the Court that such fees shall be equitably apportioned among counsel within each group.

In accordance with the foregoing Memorandum,

It Is Ordered that all parties submit, or resubmit bills of costs for final approval by this Court, in accordance with the guidelines provided herein at the conclusion of the various appeals unless otherwise modified or determined by such appellate courts upon review of our decision, orders and judgments.

At Wichita, Kansas this 17th day of June, 1969.

/s/ Wesley E. Brown
United States District Judge

APPENDIX F

Opinion of the United States Court of Appeals in Banc. Affirming Jurisdiction of the District Court and Affirming Orders Denying Motions for Dissolution of Injunctions. Dated February 11, 1964 (327 F.2d 1003)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 7580-7584, 7588

RALPH GROUNDS, ET AL., *Appellants,*

v.

NORTHERN NATURAL GAS COMPANY, a corporation, NORTHERN HELEX COMPANY, a corporation, and TEXACO, INC., *Appellees.*

RALPH GROUNDS, ET AL., *Appellants,*

v.

NATIONAL HELIUM CORPORATION, a corporation, *Appellee.*

O. W. HEGER, ET AL., *Appellants,*

v.

CITIES SERVICE GAS COMPANY, a corporation, *Appellee.*

KATHERINE R. ADAMS, ET AL., *Appellants,*

v.

CITIES SERVICE GAS COMPANY, a corporation, *Appellee.*

PAN AMERICAN PETROLEUM CORPORATION, a corporation, *Appellant,*

v.

CITIES SERVICE GAS COMPANY, a corporation, *Appellee.*

BLOYD BURGESS, ET AL., *Appellants,*

v.

CITIES SERVICE GAS COMPANY, a corporation, *Appellee.*

Feb. 11, 1964

Appeals from the United States District Court for the District of Kansas; Wesley E. Brown, District Judge.

James E. Grigsby, Oklahoma City, Okl., for appellants, Royalty Owners.

Byron M. Gray, Topeka, Kan., for National Helium Corp.

Joe Rolston, Wichita, Kan., for Northern Natural Gas Co. and Northern Helex Co.

Charles Lindberg, Oklahoma City, Okl., for Socony Mobil Oil Co.

Charles V. Wheeler, Oklahoma City, Okl., for Cities Service Gas Co.

George C. Spradling, Wichita, Kan., for Pan American Petroleum Corp.

Malcolm Miller, Wichita, Kan., for Texaco, Inc.

Before MURRAH, Chief Judge, and PICKETT, LEWIS, BREITENSTEIN, HILL, and SETH, Circuit Judges.

PER CURIAM.

These appeals are from interlocutory orders affirming jurisdiction of the United States District Court for the District of Kansas and from orders denying motions for the dissolution of injunctions. Such orders are all severally affirmed. This action is not intended to decide any issue going to the merits of any case.

APPENDIX G

Opinion of United States District Court of Kansas Overruling Motions To Dismiss for Lack of Jurisdiction and Denying Motions for Dissolution of Injunctions, Dated September 13, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. KC 1945

CITIES SERVICE GAS COMPANY, a corporation, ET AL., *Plaintiff*

v.

SOCONY MOBIL OIL COMPANY, a corporation, ET AL., *Defendant*

No. KC 1946

CITIES SERVICE GAS COMPANY, a corporation, ET AL., *Plaintiff*

v.

ASHLAND OIL & REFINING COMPANY, a corporation, ET AL., *Defendant*

No. KC 1947

CITIES SERVICE GAS COMPANY, a corporation, ET AL., *Plaintiff*

v.

COLUMBIAN FUEL CORPORATION, a corporation, ET AL., *Defendant*

No. KC 1948

CITIES SERVICE GAS COMPANY, a corporation, ET AL., *Plaintiff*

v.

PAN AMERICAN PETROLEUM CORPORATION, a corporation, ET AL., *Defendant*

No. KC 1969

NORTHERN NATURAL GAS COMPANY, a corporation, and NORTHERN HELEX COMPANY, a corporation, *Plaintiff*

v.

RALPH GROUNDS, HENRY HITCH, JR., ET AL., *Defendant*

No. KC 1980

NATIONAL HELIUM CORPORATION, a corporation, *Plaintiff*

v.

PANHANDLE EASTERN PIPE LINE COMPANY, a corporation, ET AL., *Defendant*

MEMORANDUM OF OPINION

The above six actions are interpleader actions filed pursuant to 28 U.S.C.A. 1335, Rule 22, and related statutes.

The present matters before this court concern the motions of royalty owners in all six cases to dismiss the interpleader actions filed herein; royalty owners motions in four Cities Service cases to vacate preliminary injunction, Socony Mobil Oil Company's motion to dismiss and for a more definite statement; and Pan American Petroleum Company's motion for summary judgment. The latter two motions are both filed against Cities Service Gas Company.

The Court, because of the similarity of the motions and the issues involved therein, ordered the motions argued together and in effect consolidated the cases for the purpose of disposition of the motions. These six cases have substantially similar origins and present substantially similar questions of law and fact.

In the disposition of the motions the factual situations have been determined by the pleadings, the affidavits on file, and insofar as applicable as facts the historical background of the statutory proceedings with respect to the subject matter of these actions.

Cities Service is a Delaware corporation having its principal place of business in Oklahoma and is engaged in the business as an interstate natural gas transmission company operating pipe lines within the States of Kansas, Oklahoma and Texas. Pan American, Ashland Oil and Refining Company, Columbian Fuel Corporation, and Socony Mobil Oil Company are all producers of natural gas in the "Hugoton gas area", holding leases from royalty owners and their predecessors in interest. The other defendants are royalty owners with whom the producers have leases.

Northern Natural Gas Company (Northern) and Northern Helex Company (Helex) are plaintiffs in the action No. KC 1969. Northern is a natural pipe line company,

which purchases natural gas from producers in the "Hugoton gas area" in Texas, Oklahoma and Kansas. Helex is the owner of a processing plant and is engaged in the process of extracting "helium gas mixture" from natural gas produced from the "Hugoton gas area" and is a subsidiary of Northern. Both of these corporations are Delaware corporations authorized to do business in the State of Kansas. The defendants, Grounds, et al, with the exception of the corporate defendants are "individual royalty owners" of natural gas or royalty interest subject to producing gas leases covering lands in the "Hugoton gas area". The corporate defendants are producers and include Socony Mobil, Cities Service Oil, Texaco, Phillips, Helmerich and Payne, Gulf, and Hugoton-Plains, none of whom are Kansas corporations. These producers sell the gas to Northern and Helex and account to the royalty owners for their proportionate share of such sale in accordance with the lease in effect. Helex has a contract for the sale and purchase of helium gas mixture with the United States of America. National Helium Corporation (National) is a Delaware corporation, is engaged in the extraction of helium gas which it obtains from Panhandle Eastern Pipe Line Company (Panhandle). Panhandle produces and purchases natural gas produced in Kansas, Oklahoma and Texas and has a contract with National under the terms of which National pays a contractual sum to Panhandle for the helium obtained from the gas sold to it. The gas produced by the producers is sold to pipe line companies by the producers. Pipe lines pay the producers for the gas received and the producers in turn pay the royalty owners their proportionate share of gas produced in accordance with the terms and conditions of the leases held by producers.

Shortly before the present interpleader actions were filed in this court some 550 royalty owners filed four actions in the District Court of Texas County, Oklahoma seeking a declaratory judgment that Cities Service had no title to the helium in the gas; that the royalty owners were the owners

of the helium; and that Cities Service was liable to the royalty owners for the proceeds of the sale of helium by Helex to the United States Government. The royalty owners also commenced a suit against Panhandle and National Distillers & Chemical Corp. for declaratory judgment in the same forum claiming the same relief. Royalty owners have also commenced a suit in the same forum against Northern and Helex seeking the same relief.

The royalty owners, as far as the records before this court are concerned, formed a Texas Land and Royalty Owners Association, and on December 7, 1962, adopted a motion endorsing the effort of the Helium Conservation Association to obtain a legal ruling "holding the title to all helium rights belong to the individual mineral owners and do not belong to the gas company leasing the land", and that they "assist this effort in every possible manner". A letter soliciting the cooperation of royalty owners in Kansas was sent out including an employment contract and assignment of interest and setting up meetings in Kansas to discuss, with a representative of the royalty owners' association, at some eight cities in the State of Kansas, this "matter". The letter to the Kansas royalty owners signed by one Hitch advised that he felt that the Kansas royalty owners rights could be more effectively protected at less individual expense "if we join with the Oklahoma and Texas mineral owners and present a large, unified front of hundreds of mineral owners rather than trying to establish our right separately in a low helium area with less land owners."

The six actions filed in this court were all brought as interpleader actions to require the defendants to interplead in the respective actions setting up their respective rights to the "fund". The fund in effect being the proceeds from the sale of helium after deducting the cost of its production. In each instance the court issued an order permitting the plaintiff to file a bond in lieu of deposit of interpleader fund under 28 U.S.C.A. 1335 and approved the bond. The

bonds in lieu of the interpleader fund were in different amounts depending upon the plaintiff in the case. Preliminary injunctions were issued against the defendants by this court although the file does not indicate the issuance of an injunction in the National v. Panhandle case.

Generally speaking, the motions of the defendants are sought to be sustained on the following basis:

1. That the plaintiff has deposited in the registry of the court the wrong fund.

2. The fund actually deposited is not a fund about which there can be legally a controversy under the facts.

3. There is in fact no controversy among the defendants as to such fund.

4. All persons who may have or claim an adverse interest are indispensable parties and must be made parties defendant and service obtained on them.

5. That this court is not under any duty to exercise jurisdiction in this case.

6. That plaintiffs' do not come into court with clean hands because they are selling helium at $11.78 per m.c.f. when it interpleads the helium only at 12 cents per m.c.f. (This applies primarily to Cities Service).

For the purposes of these motions it may be said that each of the leases executed by the land owners contain three pertinent provisions:

(a) The granting clauses leased the lands described for the purposes of producing oil and gas.

(b) The land owners and mineral interest owners warrant their titles to the lessee, and

(c) The lessees agree to pay the land owners a royalty on gas produced from a "well where gas only is found".

The contracts with the producers to the pipe line companies and/or extracting companies warrant the title to the

gas sold to such companies. The lease of the land owners were all entered into prior to the time that helium became of national importance and therefore economically useful.

The importance of helium to the nation as a whole may best be described from the Senate Report No. 1814 with respect to the Helium Act Amendments of 1960. The Court, in arriving at its factual determination in this case, has taken judicial notice of this report. It is quoted in some detail as follows:

> "Purpose. The primary objective of H.R. 10548 is to furnish authority to the Department of the Interior to carry out an effecti , long-range program for the production, distribution, and storage of helium in order to assure a sustained supply, taking into account supplies from other sources, to meet essential Government needs. Provision is made for cooperation by the Department of Defense and the Atomic Energy Commission. The measure also clarifies and perfects certain of the existing provisions of the Helium Act.
>
> "H.R. 10548 is written in the form of a total amendment to the act of September 1, 1937 (50 Stat. 885), as amended (50 U.S.C. 161, 163-166). The 1937 act was itself in the form of an amendment to the act of March 3, 1925 (43 Stat. 1110).
>
> "Background. Since 1925 when the Congress enacted the first Helium Act, the Government of the United States, through its Department of the Interior, has operated a virtual monopoly in the production and sale of helium gas.
>
> "So far as this committee knows—and it has inquired painstakingly into the subject—there are no substantial deposits of helium gas anywhere in the Western Hemisphere except in the United States.
>
> "The annual consumption of helium gas today in the United States is approximately 370 million cubic feet,

which is 80 times the level of consumption in 1937. Helium gas is essential to our missile and atomic energy programs and also is increasingly valuable as industrial material. Seventy percent of the helium gas now being consumed in the United States is used directly by the Department of Defense, the Atomic Energy Commission, the National Aeronautics and Space Administration, and other Federal agencies. An additional 20 percent is used in industry on Federal defense and atomic energy contracts. Smaller but important quantities are used in hospitals and in research.

"Approximately 10 percent of the present production of helium gas is used in the so-called civilian industrial field, i.e., by consumers who do not have Government contracts. To illustrate, helium gas is used as a shield in welding processes involving aluminum, titanium, and other lightweight metals.

"The upward trend in helium demand in all fields is expected to continue. Many present-day uses, including those in the missile, nuclear energy, and industrial fields, are in the early stages of development. The new field of cryogenics involving extremely low temperatures in the region of absolute zero opens up exciting new frontiers of science. Temperatures within 20° of absolute zero cannot be attained without the use of helium gas.

"Helium is a limited natural resource usually found in only a few natural gas fields. The helium-bearing gas in the principal deposits in Texas, Oklahoma, and Kansas is being produced and marketed for fuel in the Midwest without regard to the concomitant waste of helium. The helium goes along with the combustible portion of the gas and passes through the gas burners into the atmosphere without serving any useful purpose.

"The volume of helium wasted daily in fuel gases is about 10 times as great as the present daily helium

consumption in the United States. If this loss is allowed to continue unabated and if the demands for helium increase in the future as expected, the helium-bearing gas sources in the United States cannot be expected to be adequate for national needs past 1980-85.

"The need for an effective helium conservation program was studied intensively during 1957-58 by the Department of the Interior in collaboration with the Department of Defense, the Atomic Energy Commission, the Department of Commerce, the Bureau of the Budget, the Office of Civil and Defense Mobilization, and the Federal Power Commission. In a report dated January 24, 1958, these agencies unanimously recommended a new national helium conservation policy. The policy was approved by the President.

"The legislation now being considered is essentially the legislation that was subsequently recommended to the Congress by the Secretary of the Interior. The Secretary first submitted a draft bill to the President of the Senate and the Speaker of the House on August 18, 1958. A slightly revised version of the proposed legislation was submitted by the Secretary on July 27, 1959.

"Earlier Helium Acts. The original Helium Act (approved March 3, 1925) was written at a time when helium was believed to be scarce and when its potential uses were not recognized.

"In response to an executive communication, legislation was introduced in the 75th Congress for the purposes of authorizing Government plants to produce and sell helium for commercial, scientific, and medical use and of regulating and restricting the exportation of helium. At that time the Government operated a helium plant and there was one private commercial producer of a small quantity of helium. The high unit costs of production of this supplier were such as to bar

extensive nongovernmental use of helium in the medical, aeronautical, and other fields. Under the legislation, which became the act of September 1, 1937 (50 Stat. 885), the Government acquired the plant and property of the sole private producer.

"As shown in House Report 1540, 75th Congress, the intention of the Congress in enacting the 1937 act was not to supplant individual enterprise or to establish a Government monopoly but to permit the consolidation of the then existing two agencies of production in order to effect economies and permit lower selling prices both to the Government and to private users. The expectation of the Congress that helium would thus come to be more widely used has been abundantly fulfilled.

"Under today's level of annual helium consumption and with prospects of future growth virtually unlimited, the principle of economy through centralized Government production and distribution, which was the leading factor contributing to the 1937 act and program, is no longer the predominant force it then was, and there is increasing reason to encourage private industry to undertake helium production.

"Explanation of the Bill. The measure provides essentially for a conservation program and envisions the possible construction of up to 12 new plants located on helium-bearing gas pipelines to extract the helium that would otherwise be wasted from the gas before this combustible gas goes to fuel markets. The helium extracted would then be stored underground in the Government-owned Cliffside gasfield near Amarillo, Tex., until needed in the future. Other underground storage areas could be utilized as needed.

"The legislation would provide for industry being invited to participate in the program by financing, building and operating plants to separate helium from natu-

ral gas, with the helium then being purchased and conserved by the Government through the Department of the Interior. The committee was assured by representatives of the Department of the Interior that the program would be carried out without adversely affecting the flow of natural gas committed to fuel markets. The legislation would provide new legal authority to make such participation by industry possible, which cannot be done under present statutes. The long-term contracts contemplated under this act would make it feasible for private industry to negotiate with banks and other financial institutions for the capital necessary to build separation plants. If, however, private industry should not indicate a willingness and capability to perform as a helium producer in a reasonable time, the Government could undertake the program as a Government operation.

"Congressional committee hearings developed information concerning the existence of reserves of helium-bearing gases other than the combustible fuel gases involved in the conservation program developed by the Department of the Interior. Testimony before the House and Senate Interior Committees indicates that potentially large sources of helium gas are in the Pinta Dome field in Arizona and in three or four isolated fields in Colorado. The committee took notice of the importance of these deposits and of the role they should play in any helium conservation program or expansion of the so-called civilian market for this strategic material.

"The scope and dimension of the program authorized and to be developed under the present legislation should be determined and adjusted from time to time through normal governmental processes, including congressional review of Government operations and congressional consideration of future appropriation requests for continuation of the program.

"The authority given to the Secretary of the Interior by H.R. 10548 is therefore not limited to the implementation of this specific program presented by the Department of the Interior. It is necessarily broad and general and may be applied in any part of the country should a more economical or feasible system of helium conservation become available including reliance upon sources of helium not associated with combustible gases.

"Cost. An effective helium conservation program will probably require a sizable outlay of Federal funds in its early years. The committee knows of no method other than that which this legislation will provide to assure a continuous supply of helium for the national defense and other essential Government activities, but it expects the Secretary of the Interior, in administering the act, to give reasonable opportunity for and encouragement to the growth of a privately owned and operated helium industry and thus to keep the costs of the Government program to the minimum consistent with the objectives of the policy of Congress.

"Although, as indicated above, the present approved departmental program may have to be altered in the light of discoveries and other future developments, this program is the best evidence presently available of the probable costs involved in H.R. 10548.

"The legislation authorizes borrowing from the Treasury, in amounts authorized in regular appropriation acts, over a period of 25 years. The Department plans to borrow up to $255 million. Repayments to the Treasury from the helium production fund as set up in the bill in the succeeding years would amount to $500 million, fully assuring return of the amounts borrowed and interest thereon. Thereafter operation of the system or program would presumably produce an annual net income to the Treasury.

> "The program indicates that administration of the act, as proposed in H.R. 10548, would not in the long run involve a subsidy from the Treasury."

The magnitude of the present cases before this court is reflected in the various briefs and statements of counsel in their arguments to support their respective positions. These may be summarized briefly as follows:

There are approximately 3100 various land owners who have an interest in the outcome of this litigation and who are located in Kansas, Oklahoma and Texas in what is known as the "Hugoton gas area". There are some 49 different types of leases which have been executed by land owners and producers with respect to the gas produced from this area. The cost of extracting helium runs into millions of dollars for the construction of the extracting facilities alone, and according to the royalty owners, the United States by contract has agreed to pay Helex, just one of the extractors, over nine million dollars per year for a period of twenty-two years.

The defendants generally contend that the fund which the plaintiffs have deposited are computed on the basis of a percentage of the proceeds from the sale of gas to the extractors. For example, Cities Service has computed the fund on the basis of one-half of one per cent of the proceeds from the sale of gas by it to Helex. The fund thus deposited with the court pursuant to 28 U.S.C.A. 1335 in order that the court may acquire jurisdiction over the subject matter of this controversy, is therefore the wrong fund because it does not include the full amount which the United States is paying for helium to the various extractors. The proper fund according to Pan American is the fund which the royalty owners sought in the original action in the Oklahoma State Court and which is based on the proceeds of the sale of helium by the extractors to the United States. Thus the wrong fund being deposited, this court lacks jurisdiction over the subject matter of the controversy.

It is recognized that in fact no fund of money has been deposited with this court and that a bond has been deposited instead, the language of which is conditioned " • • • upon the compliance with the future order or judgment • • • " of this court. The defendants' theory, however, is that the bond is in lieu of the fund of money actually in deposit, that the bond stands in place of and represents such fund, and that if the bond is computed by reference to the wrong fund of money, jurisdiction of this court is just as fatally affected as if the wrong fund of money itself were actually on deposit. It should be pointed out here that there are no motions to increase the amount of the bond as being inadequate.

The principal issue in dispute in all of the cases before this court is not the ownership of the fund of money as defendants contend but rather the ownership or claim to ownership of the helium interest under the mineral leases. The money, as such, here in dispute, is derivative from and secondary to the helium interest. It merely reflects the helium interest in the terms of the market value. The market value of helium is merely a part of the establishment of a claim of the defendants which is not a point for our determination upon these motions. If the money fund here in question were enlarged or decreased or even totally removed no significant affect, on this lawsuit under its present posture, would result. But if the ownership of the helium interest under the terms of the mineral interest were removed from this case, there would be no lawsuit. We hold that the subject matter of controversy as contemplated by the interpleader statute is the claim of ownership under the mineral leases of the helium produced and marketed.

The contention that this action involves only the question of the ownership of a fund of money and that to acquire jurisdiction this court must have the actual and entire fund before the court is, in our opinion, erroneous. We do not consider this as such a case as was before the courts in

Gannon v. *American Airlines* (CA 10, 1958) 251 F. 2d 476, cert. denied, sub nom. *Gannon* v. *Britton,* 350 U.S. 886, 100 L.Ed. 781, 76 S.C. 140, and similar cases wherein there was an ascertained sum in dispute. The fund which defendants allege is in dispute, arises out of contracts made between extractors and the United States Government. As an example the Helex contract with the United States dated August 22, 1961, has a minimum life of twenty-two years and a maximum life co-extensive with the producing life of the wells, in the "Hugoton gas area" one of the biggest gas fields producing helium now developed.

It is obvious that under this argument at least twenty years and perhaps many more must pass before there will be such a sum certain and definite as could be completely dispositive of the issue before the court as the defendants contend. It is our opinion that an interpleader action such as this, the court's jurisdiction depends upon the bond which in this instance is "conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy".

We have no quarrel with defendants' contention that where a fund of money is placed in the registry of the court, the court's jurisdiction extends only to the fund actually on deposit and the court may not make orders in respect to future monies which subsequently may be attributable to the same fund. *Lowe's Inc.* v. *Hoyt Mfg. Corporation* (DC, NY, 1949) 83 F. Supp. 863. But defendants' argument, if valid, would deprive Federal Courts of jurisdiction of matters of this type for an indefinite period of years and defeat the announced purpose of the statute.

The interpleader statute is to be liberally construed, *Douglas-Guardian Warehouse Corporation* v. *Ramsey Seed Company* (CA, Nebr. 1959), 271 F.2d 24, and defendants position would, in our opinion thwart the purpose of the interpleader statute which is to prevent double vexation

in respect of one liability. *National Fire Insurance Company* v. *Sanders* (CA 5, 1930), 38 F.2d 212.

It is our opinion that the present case presents a classic example of the type of situation for which the interpleader statute was designed, where a request of a deposit of a fund of money would prevent just relief. *Edner* v. *Massachusetts Mutual Life Insurance Company* (CA 3, 1943), 138 F.2d 327.

28 U.S.C.A. 1335 provides:

"1335. Interpleader. (a) *The district courts shall have original jurisdiction of any civil action* of interpleader or *in the nature of interpleader filed by any person,* firm, or corporation, association, or society *having in his or its custody or possession money or property of the value of $500 or more,* or having issued, a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, *or being under any obligation written or unwritten to the amount of $500 or more,* if

"(1) *Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, or claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note,* bond, certificate, policy *or other instrument, or arising by virtue of any such obligation;* and if (2) *the plaintiff has deposited such money or property* or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, *or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plain-*

tiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931." (Emphasis supplied).

We would also point out that Rule 22 of the Rules of Civil Procedure provides as follows:

"Rule 22. Interpleader. (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. As amended Dec. 29, 1948, eff. Oct. 20, 1949."

28 U.S.C.A. 1397 referred to in the above Rule permits a civil action of interpleader or in the nature of interpleader under Section 1335 to be brought in the judicial district where one or more of the claimants reside and

28 U.S.C.A. 2361 provides for the process and procedure under the interpleader statute.

It is at least clear to us that the interpleader statute providing as it does for the jurisdiction of the United States District Courts with property in the value of $500.00 or more and obligations written or unwritten in the amount of $500.00 or more and providing for the giving of a bond in lieu of the making of a deposit, that the giving of a bond once made and pursuant to statute meets the requirements of the law conferring the jurisdiction of the court over the subject matter in controversy. See *Gannon* v. *American Airlines, supra.*

We believe that *Gannon* holds that a bond which is conditioned upon plaintiffs' compliance with the future order or judgment of the court with respect to the subject matter of the controversy in excess of $500.00, meets the requirement of the statute unless there is an abuse of judicial discretion. Thus it is by virtue of the bond and not by reason of depositing any fund of money that this court has jurisdiction over the subject matter of the present controversy. Stated another way it is our opinion that the deposit of a bond in an interpleader action is not a constructive placing of the actual subject of the controversy in this court. The deposit of the fund on the one hand and of a bond on the other are alternative provisions for the resolution of a controversy, and are defined for two entirely different purposes. The former assures to the victorious plaintiff claiming a sum certain that he will actually have a sum to take possession of upon the termination of the lawsuit or that the defendants may divide this sum certain in accordance with the judgment of the court. The latter assures that the plaintiff will comply with the future orders and judgment of the court and is to be fixed in an amount which the court deems adequate. We note that if the contention of the defendants was correct, the bond, for instance, involving sales to Helex might well be in excess of $198,000,000.00. Such a

construction would defeat, not only plaintiffs' remedy but indeed might well defeat the purposes of the Helium Act referred to above. This disposes of the first two grounds by which defendants sought to sustain their motions because we hold that under the facts before us the bonds filed by Cities Service and the other plaintiffs have vested jurisdiction of the subject matter of this controversy in this court.

The facts recited above disclose that there is certainly a controversy amongst the land owners, the producers and the extractors with respect to the ownership of the helium content of the gas which is presently being sold to the Federal Government, and indeed, there is a controversy as to who is entitled to the proceeds received from the helium and in what amount.

The fourth contention is that all persons who may have or claim an adverse interest are indispensable parties and must be made parties defendant and service obtained on them. We do not consider that this prevents the court from exercising jurisdiction of this case at this time in its present posture. In *Maryland Casualty Company* v. *Glassell-Taylor and Robinson, et al,* 156 F.2d 519, the court said:

> "The absence of parties who are not indispensable, but who ought to be brought before the Court, is not, under Rule 19(b) of the Federal Rules of Civil Procedure, grounds for dismissing the complaint when the bringing in of such parties will not defeat jurisdiction in the case. Moreover, if the bond is not a statutory bond, but is only the conventional bond of a subcontractor given to the general contractor as obligee, as appears from the contract and the allegations of the complaint, which we must take as true, the owner would be neither an indispensable, nor a necessary, party in a suit relating to the bond. The fact that the owner of the housing project is not made a party, and therefore, will not be estopped by the decree from

later making a claim against the plaintiff, will in no wise prevent the Court from adjudicating the rights of those who come in and set up their claims. The Interpleader Act does not require, nor seem to contemplate, that one should be brought in as a claimant who is not, in fact, a claimant." (Emphasis supplied).

The fifth contention that this court is not under any duty to exercise jurisdiction in this case appears to us to be ill founded. The common subject matter of this action, namely the claim of ownership under the mineral leases of the helium produced and marketed, is of important public interest, the diversity of state citizenship of the various parties to the action, all indicate to this court that the federal court is the proper forum where the dispute of these parties may be received.

The sixth and last ground raised particularly by the land owners that plaintiffs do not come into court with clean hands because they are not depositing $11.78 per m.c.f. of helium, but instead, are depositing only 12 cents per m.c.f. is a question of fact which must be determined by the court. Indeed, this claim to the proceeds of the helium is the essence of the land owners claim for recovery measured in dollars. At this stage of the proceedings, however, the question of the adequacy of the bond which we hold gave this court its jurisdiction to determine the rights of the parties with respect to the subject matter of this action, and to which the defendants are asserting or may assert a claim, does not condemn the plaintiffs for their failure to do equity.

The Court concludes that it has jurisdiction and that the motions attacking that jurisdiction will be denied in accordance with our letter of September 9, 1963.

At Wichita, Kansas this 13th day of September, 1963.

(Signed) Wesley E. Brown
United States District Judge

APPENDIX H

Order of the United States Court of Appeals for the Tenth Circuit Removing Case from the en banc Court, Dated May 11, 1981

MAY TERM - MAY 11, 1981

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

Nos. 74-1886 thru 74-1894
75-1014 thru 75-1035
75-1051 thru 75-1061
(Consolidated Helium Cases II)

NORTHERN NATURAL GAS COMPANY, et al,
(Helex Group)

vs

RALPH GROUNDS, et al,
(Landowner Group)

and

SOCONY MOBIL OIL CO., et al,
(Lessee-Producer Group)

No. 81-1159

ASHLAND OIL, INC.,
Plaintiff-Appellant,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee,

and

UNITED STATES OF AMERICA,
Intervenor-Defendant.

The Court, upon its own motion, has for consideration reactivation of the Consolidated Helium Cases II, and the assignment to a calendar and establishment of a briefing schedule in Case No. 81-1159

Upon consideration whereof, the Court orders:

1. Consolidated Helium Cases II are removed from abated status. The en banc status of these cases is terminated. The cases will be submitted to a three-judge panel for disposition.

2. Consolidated Helium Cases II are consolidated with Case No. 81-1159 for purposes of argument and submission. The consolidated cases are assigned to Calendar A.

3. Appellant's brief in Case No. 81-1159 shall be filed on or before June 20, 1981. Appellee's brief shall be filed on or before July 20, 1981. Appellant's reply brief, if any, shall be filed on or before August 3, 1981.

4. On or before July 20, 1981, the parties in Consolidated Helium Cases II may file supplemental briefs which are limited to a discussion of the law and facts as they may have developed since the cases were originally argued, and to the issue of interest on the judgment.

5. The captioned consolidated cases will be set for argument and submission to the Court during the month of August, 1981. Counsel will be notified when the exact time, date and place of oral argument have been determined.

HOWARD K. PHILLIPS
Clerk

By: /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

May 12, 1981

Howard K. Phillips
Clerk

Telephone
(303) 837-3157
(FTS) 327-3157

TO ALL COUNSEL

Re: Nos. 74-1886 thru 79-1894, 75-1014 thru 75-1035, 75-1051 thru 75-1061, Consolidated Helium Cases II
No. 81-1159, Ashland Oil, Inc., v. Phillips Petroleum Company

Dear Counsel:

Enclosed is a copy of an order entered in the captioned cases today.

Very truly yours,

HOWARD K. PHILLIPS
Clerk
By: /s/ (Illegible)

dvc

cc: Gerald Sawatzky, Foulston, Siefkin, Powers & Eberhardt, 700 Fourth Financial Center, Wichita, Kansas 67202

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Carol E. Dinkins, Department of Justice, Land & Natural Resources Division, 9th & Pennsylvania Avenue, N.W., Washington, D.C. 20530

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Don L. Jemison, Phillips Petroleum Co., 12th Floor Adams Building, Bartlesville, Oklahoma 74004

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C. A. Conoley, Panhandle Eastern Pipe Line Co., P. O. Box 1348, Kansas City, Missouri 64141

Edmund B. Clark & George R. Hyde, Department of Justice, Washington, D.C. 20530

Joseph W. Kennedy, Morris, Laing, Evans, Brock & Kennedy, 200 West Douglas, #430, Wichita, Kansas 67202

APPENDIX I

Order of the United States Court of Appeals for the Tenth Circuit Denying Landowners Motion for Certification to State Court, Dated October 4, 1979

SEPTEMBER TERM - OCTOBER 4, 1979

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges.

Nos. 74-1886, et seq. (Consolidated Helium Cases II)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),

vs.

RALPH GROUNDS, et al., (Landowner Group),

vs.

SOCONY MOBIL OIL CO., et al., (Lessee-Producer Group).

This matter comes on for consideration of the motion of Ralph Grounds, et al., the Landowner Group, for an order certifying to the Supreme Courts of Kansas and Oklahoma the questions governed by the laws of such states. The Court has also considered responses to the motion which were filed by the Lessee-Producer Group and the Helex Group and a reply to the responses which was filed by the Landowner Group.

Upon consideration whereof, the motion to certify questions to state courts is denied. Judge Holloway did not participate in the consideration or disposition of the motion.

HOWARD K. PHILLIPS
Clerk
/s/ Robert L. Hoecker
By: Robert L. Hoecker
Chief Deputy Clerk

APPENDIX J

Order of the United States Court of Appeals for the Tenth Circuit Denying Motion to Cause Trial Record to Be Brought to Tenth Circuit, Dated October 13, 1976

SEPTEMBER TERM - OCTOBER 13, 1976

Before Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Senior Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

Nos. 73-1797
73-1798
73-1799

ASHLAND OIL, INC.,
Plaintiff-Appellee and Appellant,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor-Appellant.

(CONSOLIDATED FOR REHEARING AND HEARING EN BANC INSOFAR AS PREPARATION OF RECORDS, APPENDICES, BRIEFS, AND ORAL ARGUMENT AND SUBMISSION TO THE COURT EN BANC IS CONCERNED)

Nos. 74-1886 thru 74-1894
75-1014 thru 75-1035
75-1051 thru 75-1061

(Consolidated Helium Cases II)

NORTHERN NATURAL GAS COMPANY, et al.,
(Helex Group)

v.

RALPH GROUNDS, et al.,
(Landowner Group)

and

SOCONY MOBIL OIL CO., et al.,
(Lessee-Producer Group)

This matter comes on for consideration of the motion of Helex Companies for enlargement of the procedural order of the Court entered February 5, 1976:

1. The first request is for an Order which would cause the entire testimony in the trial court at the trial on remand to be transcribed, transmitted to the Clerk of this Court, and reproduced for presentation to each member of the Court.

2. The second request is for an Order requiring the trial court to certify and transmit the pre-trial order, memorandum opinion, judgment of the trial court, and order overruling post-trial motions.

3. The third request is for an Order to transmit all Exhibits of all parties introduced at the trial on remand to the Clerk of the Tenth Circuit immediately after all parties have filed their responsive briefs together with the suggestion that numbering and indexing is unnecessary, it being sufficient to have the Exhibits readily available for examination in connection with study of the transcript of

testimony. The movant offers to pay the expense of the transmission and return of such Exhibits.

Upon consideration whereof, the Court ORDERS as follows:

1. The motion requiring a complete transcript of trial testimony to be prepared, reproduced, and forwarded is denied.

2. The motion seeking to have the trial court certify and transmit the pre-trial order, memorandum opinion, judgment of the trial court, and order overruling post-trial motions is granted.

3. The motion for an order to transmit all Exhibits as set forth in Paragraph 3 above, is denied.

The denials of motions contained in this Order are made without prejudice to the renewal of such motions at the time of or after the submission of the cases to the Court upon oral argument.

The Court currently is of the opinion that to grant these requests would destroy the elaborate program adopted by the Court and followed by counsel under its previous Orders so as to make narrative statements of the relevant facts and counter statements suffice to present sufficient background to enable the Court to fully understand the appeal and properly dispose of it.

In anticipation of an early En Banc submission of the captioned consolidated cases, the Court enters the following procedural Orders:

1. Oral argument and submission of the consolidated appeals is set for En Banc hearing in Denver, Colorado on Wednesday, November 17, 1976, at 9:30 a.m.

2. The Court will entertain the oral argument and submission in one continuous session on one day for a period of three (3) hours, allotting 1-1/2 hours to each side. The Court is aware that the argument must be made in connection with both the Ashland rehearing and the Helex Group Cases and counsel for both sides of the consolidated cases are directed to enter an agreement as to the division of the time among them and report to the Court their agreed division.

3. The oral arguments are Ordered to be reported and transcribed by a Certified Court Reporter to be approved by the Clerk of this Court at the expense of the parties and counsel should make the necessary arrangements to present to each member of the Court a full transcript of the oral argument and submission at an early date following completion of the arguments.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

APPENDIX K

Order of the United States Court of Appeals for the Tenth Circuit, Dated February 5, 1976

JANUARY TERM - FEBRUARY 5, 1976

Before Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Senior Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

Nos. 73-1797
73-1798
73-1799

ASHLAND OIL, INC.,
Plaintiff-Appellee and Appellant,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor-Appellant.

(CONSOLIDATED FOR REHEARING AND HEARING EN BANC INSOFAR AS PREPARATION OF RECORDS, APPENDICES, BRIEFS, AND ORAL ARGUMENT AND SUBMISSION TO THE COURT EN BANC IS CONCERNED)

Nos. 74-1886 thru 74-1894
75-1014 thru 75-1035
75-1051 thru 75-1061
(Consolidated Helium Cases II)

NORTHERN NATURAL GAS COMPANY, et al.,
(Helex Group)

v.

RALPH GROUNDS, et al.,
(Landowner Group)

and

SOCONY MOBIL OIL CO., et al.,
(Lessee-Producer Group)

These matters come on for consideration of petitions which suggest rehearing of the captioned Ashland and Phillips cases by this Court en banc. The Court, upon its own motion, has for consideration the reactivation and early disposition of Consolidated Helium Cases II which were Ordered held in suspense.

In the above captioned Ashland Oil, Inc., a petition for rehearing has been granted by order of Judges Breitenstein and Doyle. The Court acting en banc, Judges Seth and Holloway not participating, does now withdraw the opinion which was filed in Ashland Oil, Inc. on January 27, 1975, vacates the Judgment entered January 27, 1975, and grants rehearing en banc.

Due to the fact that there are common issues in Ashland Oil, Inc. and Consolidated Helium Cases II, the rehearing en banc in Ashland Oil, Inc. and the hearing on appeal in Consolidated Helium Cases II are hereby consolidated. The consolidated hearing en banc shall thus be in conjunction with the hearing on appeal in Consolidated Helium Cases II so as to avoid repetition as far

as possible. In view of the fact that the record in Consolidated Helium Cases II is voluminous to the extent that it is unmanageable, and in view of the suggestions of the parties that procedural orders be entered simplifying and clarifying the procedure to be followed in Consolidated Helium Cases II, the Court now concludes that the procedure for bringing the appeal to issue and to completion shall be as follows:

1. The consolidated Ashland and Helium cases shall bear the title which appears in the caption of this Order.

APPENDICES TO THE RECORD

2. The Court recognizes that there are basically three classes of litigants involved in the Consolidated Helium Cases II. First, the Helex Group; second, the Landowner Group; and, third, the Lessee-Producer Group together with Phillips Petroleum Company. These classes shall be utilized for the purpose of filing appendices to the record and briefs.

3. On or before April 15, 1976, each group of litigants, that is, the Helex Group, the Landowner Group, and the Lessee-Producer Group, together with Phillips Petroleum Company, shall file on behalf of the group a consolidated statement of facts. This shall be a cooperative effort on behalf of each member and all members of the group. It is to include a narrative summary of the factual material important to the group as reflected by the record. There shall also be included a description of the factual disputes and the evidence in support of the positions of the three classes. Further, there shall be a description of the evidence having significance in the resolution of the issues on appeal. Each of the three classes shall file these statements so as to present the facts and evidence important to all of the parties and at the same time avoid

repetition of the factual material. The individual narrative statements described above are not to exceed 75 pages each. If any party within a group believes after completion of the group statements that the group narrative statement has not fully presented the facts important to that party, it may file a supplemental statement on its own behalf, which statement shall not exceed 15 pages.

4. In addition to the factual statements referred to above, each group is also authorized to submit as part of the appendix on behalf of each group reproductions of those exhibits which the group considers as necessary or indispensable to the formulation and resolution of the issues on appeal. Repetition of exhibits, as well as inclusion of irrelevant parts of the exhibit, is to be avoided.

5. So as to avoid duplicative materials, the Court hereby adopts for reference purposes the eight volumes of the appendix which were filed in connection with Helium I. Matters contained in these appendices need not and should not be repeated in the narrative statements. The parties shall file 10 copies of the Helium I appendices for the use of the Court in this appeal.

THE BRIEFING SCHEDULE

6. On or before June 15, 1976, each of the groups, that is, the Helex Group, the Landowner Group, and the Lessee-Producer Group, together with Phillips Petroleum Company, shall submit an initial or opening brief on behalf of its group. This shall be a cooperative effort on the part of the members of the group. Each group brief is limited to a maximum of 50 printed pages. The allotment of time for the filing of these briefs shall be 60 days.

7. The Court recognizes that the consolidated or group briefs will not in some instances fully present the position of the individuals within the group. With that in mind, each of the individual group litigants may (but

need not do so) within the time allotted to the group file individual supplemental briefs, which briefs shall not exceed 15 printed pages. The United States is granted 60 days from July 15, 1976, in which to file its answer brief. This is not to exceed 75 pages.

8. Reply briefs by the above defined groups may be filed within 14 days after the filing of the responsive briefs of the United States. These reply briefs are not to exceed 25 pages.

9. No docketing statements shall be filed.

10. The parties shall file 25 copies of printed briefs with the Court and shall serve upon their opponents the number of copies agreed upon by the parties.

11. The appeals will be set for en banc argument following the completion of the filing of the briefs and appendices.

12. The record on Phase I and Phase II of the Helex cases shall be retained in the District Court unless this Court shall order it transmitted for consideration on appeal. The records will, nevertheless, be a part of the record on appeal for all purposes.

13. There are to be no extensions in the foregoing schedule except by Order of the Court.

14. If there are any objections to this Order, they are to be filed no later than February 15, 1976.

15. In the Ashland rehearing, each side shall have 30 days from February 15, 1976, plus 14 days within which to prepare and file briefs on rehearing.

16. The Honorable William J. Holloway, Jr., Circuit Judge, did not participate in this action.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

APPENDIX L

Judgment on Remand of the United States District Court for the District of Kansas, Dated December 13, 1974

(Filed December 16, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. KC-1969 (Consolidated with Civil Actions Nos. KC-1945, KC-1946, KC-1947, KC-1948 and KC-1980)

NORTHERN NATURAL GAS COMPANY, et al.,
Plaintiffs,

vs.

RALPH GROUNDS, HENRY HITCH, JR., et al.,
Defendants.

Civil Action No. KC-1945

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

vs.

MOBIL OIL CORPORATION, et al.,
Defendants.

Civil Action No. KC-1946

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

vs.

ASHLAND OIL AND REFINING COMPANY, et al.,
Defendants.

Civil Action No. KC-1947

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

vs.

COLUMBIAN FUEL CORPORATION, et al.,
Defendants.

Civil Action No. KC-1948

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

vs.

PAN AMERICAN PETROLEUM CORPORATION, et al.,
Defendants.

Civil Action No. KC-1980

NATIONAL HELIUM CORPORATION,
Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, et al.,
Defendants.

JUDGMENT ON REMAND

These six consolidated interpleader actions having come on regularly for trial upon remand from the decision of the United States Court of Appeals for the Tenth Circuit (reported at 441 F.2d 704) and the evidence of the parties having been submitted herein, and the Court having made its Memorandum of Opinion, Findings of Fact and Conclusions of Law Upon Remand (which is incorporated herein by this reference thereto), it is ordered, adjudged and decreed as follows:

1. That the primary question to be determined in the present proceedings, as directed by the remand, is the reasonable value of the helium content of the helium-bearing natural gas at the time and at the point that such helium-bearing natural gas was delivered to Northern Natural Gas Company, Cities Service Gas Company, and to Panhandle Eastern Pipe Line Company and which helium content was subsequently extracted by the plaintiffs in interpleader and delivered to the United States under contracts between the United States and Northern Helex, Inc. (formerly Helex, Inc.) dated August 15, 1961; between the United States and Cities Service Helex, Inc. executed August 22, 1961, and between the United States and National Helium Corporation dated October 13, 1961.

2. That the reasonable value of such helium content at the time and at the point it was delivered to the pipeline companies was as follows:

1961	60 cents per Mcf of helium
1962	61 cents per Mcf of helium
1963	62 cents per Mcf of helium
1964	63 cents per Mcf of helium
1965	64 cents per Mcf of helium
1966	65 cents per Mcf of helium
1967	66 cents per Mcf of helium
1968	67 cents per Mcf of helium
1969	68 cents per Mcf of helium
1970	69 cents per Mcf of helium
1971	70 cents per Mcf of helium
1972	70 cents per Mcf of helium

3. That the named "Lessee-Producer" defendants in KC-1969 are Ashland Oil & Refining Company, Cities Service Oil Company, Gulf Oil Corporation, Helmerich &

Payne, Inc., Mapco Production Company (successor to Hugoton Plains Gas and Oil Company), Mobil Oil Corporation, Texaco, Inc., and Phillips Petroleum Company, appearing individually and as representative of a class of Lessee-Producer defendants described as:

> ". . . the persons, firms and corporations denominated 'lessee-producers' who are the owners of leasehold interests in the oil and gas leases from which gas is produced for delivery to Northern Natural Gas Company and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Northern Natural Gas Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader Northern Helex Company, into the possession of the United States of America at the delivery point described in that certain contract between the United States and Northern Helex Company (formerly Helex, Inc.) dated August 15, 1961."

4. That the named "Lessee-Producer" defendants in KC-1945, KC-1964, KC-1947, and KC-1948 are Mobil Oil Corporation, Ashland Oil & Refining Companies, Cities Service Oil Company (formerly Columbian Fuel Corporation) and Amoco Production Company (formerly Pan American Petroleum Corporation), appearing individually and as representative of a class of Lessee-Producer defendants described as:

> ". . . consists of the persons, firms and corporations denominated 'lessee-producers' who are the owners of leasehold interests in oil and gas leases productive of helium-bearing natural gas and who deliver, have delivered or will deliver helium contained in such gaseous streams directly or indirectly to Cities Service Gas Company, which helium has been, is being, and

will be removed and delivered by plaintiff in interpleader, Cities Service Helex, Inc., into the possession of the United States of America at the delivery point described in that certain contract between the United States of America and Cities Service Helex, Inc., dated August 22, 1961."

5. That the named "Lessee-Producer" defendants in KC-1980 are Ashland Oil & Refining Company, Cities Service Oil Company, Cabot Corporation, Cities Service Oil Company (formerly Columbian Fuel Corporation), Gulf Oil Corporation, Helmerich & Payne, Inc., Mobil Oil Corporation, Amoco Production Company (formerly Pan American Petroleum Corporation), Diamond Shamrock Corporation (successor to the Shamrock Oil and Gas Corporation), Texaco, Inc., Dorchester Gas Producing Company, and The Superior Oil Company, appearing individually and as representative of a class of Lessee-Producer defendants described as:

". . . the persons, firms and corporations denominated 'lessee-producers,' who are the owners of leasehold interests in the oil and gas leases (from which gas is produced for delivery to Panhandle Eastern Pipe Line Company) and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Panhandle Eastern Pipe Line Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader National Helium Corporation into the possession of the United States of America at the delivery point described in that certain contract between the United States and National Helium Corporation dated October 13, 1961."

6. That the named "Landowner" defendants in KC-969 are Ralph Grounds, et al. and Oliver S. Brown, et al.,

being approximately 560 named individuals appearing individually and as representatives of a class of Landowner defendants described as:

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium is being or will be taken into the possession by the United States of America in Ellsworth County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Northern Helex Company (formerly Helex, Inc.) dated August 15, 1961."

7. That the named "Landowner" defendants in KC-1945 are O. W. Heger, et al. and Oliver S. Brown, et al., being approximately 700 named individuals; in KC-1946 are Vivian W. Scheutt, et al., J. W. Teater, Guy T. Miller, Marjorie S. Maser, Marion S. Pfeiffer, Federal Land Bank of Wichita, and Oliver S. Brown, et al., being approximately 210 named individuals; in KC-1947 are Katherine R. Adams, et al., and Oliver S. Brown, et al., being approximately 210 named individuals; and in KC-1948 are Bloyd Burgess, et al., and Oliver S. Brown, et al., being approximately 110 individuals appearing individually and as representatives of a class of Landowner defendants described as:

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken into possession by the United States of America in Grant County, Kansas, at the delivery point de-

scribed in that certain contract between the United States of America and plaintiff in interpleader Cities Service Helex, Inc., dated August 22, 1961."

8. That the named "Landowner" defendants in KC-1980 are Ralph Grounds, et al., and Oliver S. Brown, et al., being approximately 550 named individuals, individually and as representatives of a class of Landowner defendants described as:

". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being, or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken into possession by the United States of America in Seward County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader National Helium Corporation, dated October 13, 1961."

9. That judgment is hereby entered against the respective plaintiff Helex Companies for, and requiring them to pay into the registry of the Court, in their respective interpleader cases, on an annual basis to the nearest accounting date to January 1, 1972, as shown in the evidence and in accordance with the Court's findings and conclusions, to the Lessee-Producers and the members of the respective classes which they represent, as their interests may appear, the reasonable value of the helium as described herein, together with interest thereon at the rate of six per cent (6%) per annum from the end of each year to the date of this judgment and at a rate of eight per cent (8%) thereafter on the total of said principal amounts and said pre-judgment interest thereon, until such sums are paid into the registry of the Court.

10. That the plaintiff Helex Companies shall deposit in the registry of this Court the sums reflected to be due by such accountings. All funds paid into the Court shall remain under supervision of the Court, and subject to further order with reference to the ultimate disposition thereof as herein provided.

11. That the Lessee-Producer defendants, including Panhandle Eastern Pipe Line Company, as a Lessee-Producer, shall account on such annual basis and in accordance with the Court's findings and conclusions to the Landowners and the members of the classes which they represent, as their interests may appear, for fifty per cent (50%) of the amounts accounted for by the Helex Companies to the Lessee-Producers in accordance herewith and the findings and conclusions, which accounting shall be subject to the approval of the Court after notice and hearing.

12. *The Court retains jurisdiction of the fund consisting of the "money paid and to be paid by the United States to the Helex Companies for the helium-gas mixture"* delivered to the United States under contracts between the United States and Cities Service Helex, Inc., dated August 22, 1961, between the United States and Northern Helex Company (formerly Helex, Inc.) dated August 15, 1961, and between the United States and National Helium Corporation dated October 13, 1961, pending all necessary further proceedings herein in connection with an accounting for the reasonable value of helium subsequent to the accounting period set forth in Paragraph 9 hereof and for the purpose of making distribution out of such fund in accordance with the Court's orders to be made pursuant to Paragraph 13 following.

13. The parties shall, at a time to be hereafter determined by the Court, after this Judgment is no longer subject to appeal, file with the Clerk of this Court their

respective claims for costs and litigation expenses, including attorney fees, which claims shall be allowed and paid in amounts found proper by the Court, according to guidelines provided in the prior order of this Court regarding 6/11/69 [Dkt. #1372] and after a hearing thereon, in the manner and upon such notice as the Court shall hereafter determine.

Payment thereof shall be made out of the fund consisting of "the money paid and to be paid by the United States to the interpleading plaintiffs for the helium-gas mixture produced and sold by them" to the United States under the contracts described in Paragraph 12 above, *over and above* that portion thereof to be accounted for pursuant to Paragraph 9 above.

14. That all claims, counter-claims, cross-claims, issues or contentions submitted by the respective parties and attached to the Pre-Trial Order filed January 9, 1974, and Appendices thereto, and not herein disposed of, are deemed to have been by the Court denied or overruled.

At Wichita, Kansas this 13th day of December, 1974.

/s/ Wesley Brown
Chief Judge

APPENDIX M

Order of the United States Court of Appeals for the Tenth Circuit Relating to Costs, Dated March 16, 1972

MARCH TERM - MARCH 16, 1972

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

307-69, 308-69, 309-69, 310-69, 311-69, 312-69, 313-69, 314-69, 315-69, 316-69, 317-69, 318-69, 319-69, 320-69, 321-69, 322-69, 361-69, 362-69, 363-69, 364-69, 365-69, 366-69, 367-69, 368-69, 369-69, 370-69, 371-69, 372-69, 373-69, 374-69, 375-69, 376-69, 377-69, 378-69, 379-69, 380-69, 381-69, 382-69, 383-69, 384-69, 385-69, 386-69, 387-69, 388-69, 389-69, 390-69, 391-69, 392-69, 393-69, 394-69, 395-69, 396-69, 397-69, 398-69, 399-69, 400-69, 401-69, 402-69, 486-69, 487-69, 488-69, 489-69, 490-69, 491-69, 492-69, 493-69, 494-69, 495-69, 496-69, 497-69, 498-69, 499-69, 500-69, 501-69, 502-69, 503-69, 504-69, 505-69, 506-69, 507-69, 508-69, 509-69, 510-69, 511-69, 512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY; et al.,
(Helex Group)
Appellees and Cross-Appellants,

vs.

RALPH GROUNDS, HENRY HITCH; et al.,
(Landowners)
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted); et al.,
(Lessee-Producers)
Appellants and Cross-Appellees.

These cases are before the Court on matters pertaining to the taxation of costs and the issuance of mandates.

The opinion and judgment of the Court disposed of 88 appeals entered in eight civil actions consolidated for trial in the district court. For convenience the parties are divided into four groups; (1) the landowners; (2) the lessee-producers; (3) the Helex group, and; (4) the United States.

Two of the eight district court actions were brought by the landowners against the United States and members of both the Helex and the lessee-producers groups. The judgment of the district court was against the landowners and we affirmed.

Six of the eight district court actions were in the nature of interpleader brought by members of the Helex group against the lessee-producers and the landowners. The Helex group prevailed in the District Court and we reversed, holding that the lessee-producers must be paid the reasonable value of the helium content of the processed gas and that the lessee-producers must pay royalty on the sums so received to the landowners.

Phillips Petroleum Company is in a unique position. It was joined by the United States as a third-party defendant in the landowners' two suits. Also Phillips was brought in as a lessee-producer in two interpleaders but disclaimed any interest in the fund.

The United States has filed no claim for costs.

The following claims for costs have been filed:

Landowners

$5,078.68—Included is an item of $80.00 for filing notices of appeal in the District Court and $80.00 for cost bond premiums.

Lessee-producers

$23,988.06—On their claims against the interpleaded fund.

$ 4,136.86—On their claims regarding the appeals of the landowners.

Panhandle Eastern Pipe Line Company and National Helium Corporation

$1,106.53—Included were the following items:

(a) Reproducing copies of record index	$100.00
(b) Cost bond	10.00
(c) Postage	10.00
(d) Transmission of record	102.34
(e) Printing petition for rehearing	214.50
Total	$436.84

Cities Service Gas Company, Cities Service Cryogenics, Inc., and Cities Service Helex, Inc.

$1,758.95—Included were cost items of $180.00 for premiums on appeal bonds and $60.00 for filing notices of appeal in the District Court.

Northern Natural Gas Company, Northern Helex Company and Northern Gas Products Company

$1,758.95—Included were cost items of $180.00 for premiums on appeal bonds and $60.00 for filing notices of appeal in the District Court.

Phillips Petroleum Company

$1,177.19

It is impossible to segregate the costs on the basis of separate appeals or of separate district court actions.

In presenting their cost bills the landowners and the members of the Helex Group have made no segregation between the two cases brought by the landowners and the six interpleaders. In the circumstances we believe it is just and equitable that, of the landowners' claims, 25% shall be disallowed and 75% shall be allowed as a claim against the interpleaded fund, and that the claims of the members of the Helex group shall be allowed to the amount of 25% thereof against the landowners and the remainder, or 75%, shall be disallowed. The lessee-producers have segregated their claims against the landowners and against the interpleaded fund and we accept their segregation. The Phillips claim for costs shall be allowed against the landowners.

It is accordingly ORDERED:

1. The request for oral argument is denied.

2. The interpleaded fund is the reasonable value at time of sale of the helium content of the natural gas which the Helex group has received from the lessee-producers and which has been processed in the plants of the Helex group for the separation of helium from natural gas. We leave to the trial court the determination of the time of sale, the points of delivery, and the method of measurement. Such determination shall be subject to review by this Court.

3. The objections of members of the Helex group to an item of $17,473.12 in the cost bill of the lessee-producers for the printing of a portion of the joint appendix and to an item of $1,729.70 in the cost bill of the landowners for a similar purpose are overruled. The Court finds that the portions of the joint appendix to which reference

is made were necessary for the determination of the issues presented.

4. The objections of the lessee-producers to the allowance to the landowners of $80.00 for filing notices of appeal in the District Court and of $80.00 for cost bond premium are sustained and the mentioned items are disallowed.

5. The objections of the lessee-producers to the allowance to Panhandle Eastern Pipe Line Company and the National Helium Corporation of the following items are sustained and those items are disallowed:

(a) Reproducing copies of record index	$100.00
(b) Cost bond	10.00
(c) Postage	10.00
(d) Transmission of record	102.34
(e) Printing petition for rehearing	214.50
Total disallowed	$436.84

6. The objections of the lessee-producers to the allowance to Cities Service Gas Company, Cities Service Cryogenics, Inc., and Cities Service Helex, Inc., of $180.00 for premiums on appeal bonds and a total of $60.00 for filing notices of appeal in the District Court are sustained and the mentioned items are disallowed.

7. The objections of the lessee-producers to the allowance to Northern Natural Gas Company, Northern Helex Company, and Northern Gas Products Company of $180.00 for premiums on appeal bonds and $60.00 for filing notices of appeal in the District Court are sustained and the mentioned items are disallowed.

8. The lessee-producers are awarded costs in the amount of $23,988.06 as a claim against the interpleaded

fund, and in the amount of $4,136.86 to be paid by the landowners.

9. The landowners are awarded costs in the amount of $3,689.01 as a claim against the interpleaded fund.

10. Panhandle Eastern Pipe Line Company and National Helium Corporation are awarded costs in the amount of $167.43 to be paid by the landowners.

11. Cities Service Gas Company, Cities Service Cryogenics, Inc., and Cities Service Helex, Inc., are awarded costs in the amount of $379.74 to be paid by the landowners.

12. Northern Natural Gas Company, Northern Helex Company, and Northern Gas Products Company are awarded costs in the amount of $379.74 to be paid by the landowners.

13. Phillips Petroleum Company is awarded costs in the amount of $1,177.19 to be paid by the landowners.

14. This Order covers only costs in the Court of Appeals. District Court costs shall be determined by the District Court, subject to review by this Court.

15. The right of the lessee-producers to interest, and the amount thereof, on any sums which the District Court may adjudge to be due and owing to them shall be determinated by the District Court, subject to review by this Court.

16. The mandate shall issue forthwith.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

APPENDIX N

Pretrial Order Prepared by the United States District Court for the District of Kansas, Dated January 9, 1974

(Filed January 9, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Actions Nos.
KC-1969, KC-1945,
KC-1946, KC-1947,
KC-1948, KC-1980
(Consolidated)

NORTHERN NATURAL GAS COMPANY, et al.,
Plaintiffs,

vs.

RALPH GROUNDS, HENRY HITCH, et al.,
Defendants.

PRE-TRIAL ORDER

Commencing on November 5, 1973, a final pre-trial conference was held in the above entitled cases. The same was continued from time to time thereafter, and several proposed pre-trial orders have been submitted to the Court, together with extensive correspondence among counsel, regarding settlement of a final order.

After reviewing such proposed pre-trial orders, and after consideration of matters contained in such correspondence, the Court settles and adopts the following Pre-Trial Order to be applicable to the District Court phase of this case required by remand from the United States Court of Appeals for the Tenth Circuit.

I

APPEARANCES

Counsel present and participating for the respective parties are reflected by the transcript of the pre-trial proceedings.

II

CONSOLIDATION

Cases numbered KC-1945, KC-1946, KC-1947 and KC-1948 are consolidated with the provision that any judgment rendered in any one of said cases will be binding upon the parties in all of such cases, insofar as any ruling in this phase of the litigation is concerned. As so consolidated, said cases are further consolidated with cases Nos. KC-1969 and KC-1980 for purposes of trial.

In accordance with the prior order of this Court on October 15, 1973, the Landowners' Motion to Consolidate Case No. W-4613 is Overruled, and such case will not be consolidated with these actions.

III

PARTIES

The parties to the consolidated interpleader actions, and the classes which they represent, are the same as in the original proceedings reported at 292 F. Supp. 619, with the exception that since the decision of the United States Court of Appeals, the United States has been allowed to intervene. The propriety of such intervention has been questioned, and will be reconsidered by the Court upon receipt by it of a memorandum to be submitted on behalf of the United States.

Atlantic Richfield Company has moved for an Order permitting it to intervene as a member and representative

of the class of lessee-producers herein. After review of the proposed Complaint in Intervention, the Court determines that it presents matters relevant to the issues to be determined in the accounting phase of these actions, that such intervention will not cause delay or prejudice, and that accordingly, Atlantic Richfield Company should be granted the right to intervene as a member and representative of the class of lessee-producers.

IV

AMENDED OR SUPPLEMENTAL PLEADINGS

The Court orders that there shall be no additional or supplemental pleadings filed herein. All issues to be tried are set out in, and shall be decided on, the basis of the Mandate of the Court of Appeals and this Pre-Trial Order.

V

NATURE OF THE CASE

This matter is before the Court pursuant to Mandate of the United States Court of Appeals for the Tenth Circuit, which Mandate consists of a judgment entered in the Court of Appeals on March 2, 1971, the Order of said Court relating to costs entered on March 16, 1972, and the opinion of that Court filed March 2, 1971, reported at 441 F. 2d 704, which together constitute the Mandate of the Court of Appeals.

Pursuant to that Mandate, this Court is concerned herein with the determination of the reasonable value of the helium content of the process gas, which said reasonable value, must be paid by the helex group to the lessee-producers, and royalties thereon paid by the lessee-producers to the landowners.

VI

ORDERS OF THE COURT

1. The Court has jurisdiction of the parties and the subject matter of this action.

2. The accounting period to be considered at trial is the time from the commencement of extraction in the helex group plants to the nearest practicable accounting date to January 1, 1972.

The Court retains jurisdiction to require and consider such supplemental accountings as may be appropriate.

3. The Motion to Intervene by Atlantic Richfield Company is Sustained, and such company is permitted to intervene as a member and representative of the class of lessee-producers herein.

VII

ISSUES

The issues to be decided in this accounting phase of the subject cases are:

A. *Reasonable value of helium*

1. What was the reasonable value at the time of sale of the helium content of the natural gas which the helex group has received from the lessee-producers and which has been processed in the plants of the helex group for the separation of helium from natural gas?

2. Are the helex companies accountable in these interpleader actions to the lessee-producers for helium extracted and stored by the helex companies, or extracted and sold privately, or extracted and delivered to the United States, but not paid for, or extracted and vented because

of the refusal of the United States to accept further deliveries?

3. Is interest payable on the value of the helium delivered and extracted, from the dates of such delivery?

B. *Allocation of the Fund*

1. What recovery should be awarded from the fund for costs and litigation expenses, including attorneys fees?

2. What is the proper basis for allocating the payment for helium among the members of the lessee-producers class? E.g., the status of Phillips Petroleum Company and Atlantic Richfield Company.

3. What is the proper basis for computing the amount of royalties which the lessee-producers must pay to the landowners?

In addition to the foregoing, the Court will also consider the evidence and legal questions with respect to various contended issues submitted by the respective parties, the same being attached hereto as appendices, and identified as follows:

Appendix A—Issues of Cities Service Gas Company, Cities Service Cryogenics, Inc., and Cities Service Helex, Inc., in all cases in which they are parties.

Appendix B—Issues of Northern Natural Gas Company and Northern Helex Company in all cases in which they are parties.

Appendix C—Issues of National Helium Corporation and Panhandle Eastern Pipe Line Company in all cases in which they are parties.

Appendix D—Issues of the United States.

VIII

DISCOVERY

On or before February 1, 1974, the parties will exchange lists of the names and addresses of all known witnesses who may testify in their respective cases in chief, together with a concise statement of the subject matter with respect to which such person may testify. The parties may make revisions, deletions or additions to their respective witness lists and serve the same on or prior to February 15, 1974. Depositions shall be concluded on or before February 15, 1974. In the taking of any such depositions of witnesses who are reasonably subject to the control of a party, the witnesses shall be submitted for interrogation at Wichita, Kansas, unless otherwise agreed upon.

The Department of Justice does not consider witnesses from other United States agencies to be reasonably subject to its control. It will endeavor to obtain the presence of such witnesses available in Wichita, but may leave the final decision to the Court or to the agencies involved if such agency fails to cooperate.

IX

PRE-TRIAL BRIEF

Each of the parties will submit to the Court and to opposing counsel ten (10) days prior to March 4, 1974 a Pre-Trial Brief, which shall contain the following:

A. The name of each witness and a brief summary of his testimony.

B. A concise, tabulated summary by each party reflecting its views concerning a computation of the

"reasonable value" of helium extracted by the helex companies.

C. The documentary evidence relied upon by the party by exhibit number with a brief statement as to what the document or documents show. In this respect, if the party relies upon evidence offered in the original trial of this action, the portions of such evidence relied upon shall likewise be designated and identified in such pre-trial brief.

D. If depositions or other matters filed or of record herein are to be used, specific reference shall be made to the page number or numbers in depositions relied upon, or the docket numbers of other matter to be used.

E. Witnesses not so listed, documents or depositions not so referenced, shall not be used by any party in its case in chief, except upon the order of the Court, or upon proper rebuttal.

F. Briefs of the law relied upon to sustain the party's position at the trial.

X

TRIAL AND TRIAL PROCEDURE

1. The trial herein will be at Wichita, Kansas. It will commence March 4, 1974 or as soon thereafter as the Court determines. It shall be to the Court without a jury and all parties have waived their right, if any, to a jury trial.

2. Evidence shall be introduced in the following order:

A. Evidence of the lessee producers.

B. Evidence of landowners.

C. Evidence of the helex companies.

D. Evidence of the United States.

3. A party offering any documents shall indicate on the document the portion relied upon, if less than all. In the case of lengthy documents or books, copies of the parts relied upon shall be prepared and used as exhibits. The whole of such documents or books shall be available for examination, but normally will not be admitted.

4. Evidence shall be offered in all cases consolidated herewith in one trial. It shall not be necessary to specify evidence as applicable or inapplicable in any particular cases, party or issue in order to make a record by proponent nor to preserve an exception thereto by an opponent. Exhibits designated by any party may be offered by any other party. Evidence presented by any party to any case shall be available for use by any other party in any case.

5. All matters discovered in any of these actions may be relied upon, if otherwise competent, relevant and material, by any other party in any of these proceedings without being duplicated by other parties.

6. No party shall object to the offer of any report, publication or other document issued, or maintained, by any branch, department, or agency of the United States Government or of the States of Kansas, Oklahoma, or Texas on the ground that such report, publication or other document has not been certified or authenticated.

7. To the extent practicable, all exhibits proposed to be introduced shall be marked and numbered by the clerk and made available to all parties for inspection and copying prior to the submission of the pre-trial briefs so that such briefs will identify the exhibits referred to therein by the numbers assigned by the clerk.

8. Each party shall at the close of each trial day, to the fullest extent possible, announce to opposing counsel the identity of witnesses, depositions, stipulations, admissions, answers to interrogatories and documents, other than for purposes of impeachment, he proposes to introduce during the following trial day.

9. Each motion and each objection made by any of the parties shall be considered as made by each of the other parties similarly situated, and on all grounds given in support of each motion and each objection in the same manner and to the same extent as though each such motion or objection had been made separately by each such party, unless otherwise stated.

10. At the conclusion of the trial counsel shall, within a time to be fixed by the Court, submit proposed findings of fact and conclusions of law.

XI

This Pre-Trial Order supersedes all pleadings and shall control the subsequent course of this action, and shall not be modified except by order of the Court on its own motion or on motion by a party to prevent manifest

IT IS SO ORDERED.

At Wichita, Kansas this 9th day of January, 1974.

/s/ Wesley E. Brown
Chief Judge

Appendix A

ISSUES OF CITIES SERVICE GAS COMPANY, CITIES SERVICE CRYOGENICS, INC., and CITIES SERVICE HELEX, INC., IN ALL CASES IN WHICH THEY ARE PARTIES

1. What was the reasonable value at point of delivery of the helium contained in the helium-bearing natural gas delivered in each instance by lessee-producers to the helex companies which is ultimately extracted, sold to, and paid for by the United States under the Conservation Program?

2. What is the time of sale, what are the points of delivery, and what is the method of measurement of the helium in the helium-bearing natural gas stream?

3. Are the contract prices agreed upon between the lessee-producers and the pipe line purchasers controlling in determining the reasonable value of the helium constituent in the helium-bearing natural gas?

4. If the Court should find that the reasonable value of the helium exceeds the contract prices agreed upon between the lessee-producers and the pipe line purchasers, then would such a finding deprive the pipe line purchasers of their private contract rights in violation of the Fifth Amendment to the Constitution of the United States?

5. If the Court should find that the reasonable value of the helium exceeds the contract prices agreed upon between the lessee-producers and the pipe line purchasers, then will the provisions of the Natural Gas Act of 1938, 15 U.S.C. 717, et seq, and Section 11 of the Helium Act Amendments of 1960, 50 U.S.C. 167(i), as so construed and applied to the helex companies, be repugnant to and

in contravention of the Due Process and Just Compensation Clauses of the Fifth Amendment to the Constitution of the United States?

6. In the accounting between the helex companies and the lessee-producers, to what offsets and recoupments, if any, are the helex companies entitled?

7. Does the Court have jurisdiction over the subject matter and the parties?

Appendix B

ISSUES OF NORTHERN NATURAL GAS COMPANY, NORTHERN HELEX COMPANY

and

NORTHERN GAS PRODUCTS COMPANY
In Case No. KC-1969

1. Does the Court has jurisdiction over the subject matter and the parties?

2. What was the reasonable value at point of delivery of the helium contained in the helium-bearing natural gas which was delivered in each instance by lessee-producers to the Helex companies which was ultimately extracted, sold to, and paid for by the United States under the Conservation Program?

3. What was the time of sale, what were the points of delivery, and what was the method of measurement of the helium in the helium-bearing natural gas stream?

4. Were the contract prices agreed upon between the lessee-producers and the pipe line purchasers controlling in determining the reasonable value of the helium constituent in the helium-bearing natural gas?

5. If the Court should find that the reasonable value of the helium exceeds the contract prices agreed upon between the lessee-producers and the pipe line purchasers, then as construed and here sought to be applied to the Helex companies, are the Natural Gas Act and Section 11 of the Helium Act Amendments repugnant to and in contravention of the Due Process and Just Compensation Clauses of the Fifth Amendment to the Constitution of the United States?

6. In the accounting between the Helex companies and the lessee-producers, to what offsets and recoupments, if any, are the Helex companies entitled?

Appendix C

ADDITIONAL ISSUES SUBMITTED BY PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION

1. Whether the value for that portion of the helium bearing natural gas over which the Federal Power Commission had no jurisdiction, i.e., the helium constitutent, is fixed by the contract prices as agreed to by the lessee-producers selling the entire gas stream and the helex companies purchasing the entire gas stream.

2. With reference to lessee-producers whose contracts for the sale of the gas to helex companies were unaffected by Federal Power Commission ceilings as to the amounts payable for gas delivered:

(a) Whether such lessee-producers share in the interpleaded funds.

(b) Whether such lessee-producers are included within the class of lessee-producers as heretofore defined by the Court, and if so, whether they should

be described described as a sub-class of the class heretofore defined.

3. With reference to lessee-producers whose contracts specifically reserved to the producers the option to extract helium from the natural gas prior to its delivery to a helex company or to thereafter waive any claim to the helium:

(a) Whether such lessee-producers share in the interpleaded funds.

(b) Whether such lessee-producers are included within the class of lessee-producers as heretofore defined by the Court, and if so, whether they should be described as a separate sub-class of the general class heretofore defined.

4. With reference to Phillips Petroleum Company:

(a) Whether its disclaimer of any interest in the interpleaded funds bars it from sharing therein.

(b) Whether it is included in the class of lessee-producers as heretofore defined by the Court and, if so, whether it should be a separate sub-class of the general class.

5. With reference to lessee-producers or pipe line companies which supply natural gas to a helex company under exchange contracts and receive other gas in return:

(a) Whether such lessee-producers or pipe line companies have any share in the interpleaded funds and, if so, what credit will apply for the helium constituent in the gas returned to such producers or pipe line companies.

(b) Whether such producers are included in the class of lessee-producers as heretofore defined by the

Court and, if so, whether they should be defined as a separate sub-class.

(c) Whether such pipe line companies are included in the class of lessee-producers as heretofore defined by the Court and, if so, whether they should be defined as a separate sub-class.

6. With reference to lessee-producers who entered into settlement agreements of disputes in litigation or under conditions of threatened litigation, or in exchange of properties, and who agreed to forbear asserting any and all claims with respect to past or future production:

(a) Whether such lessee-producers are entitled to share in the interpleaded funds.

(b) Whether such lessee-producers are included in the class of lessee-producers as defined by the Court and, if so, whether they should constitute a separate sub-class.

7. Whether the lessor-landowners share in the interpleaded funds in those instances in which the helex company is also the lessee-producer and has paid the lessor-landowners a royalty based upon the market value of the natural gas produced, or if the lessor-landowners are engaged in separate litigation wherein they seek to recover an increased royalty based upon the market value of the natural gas produced.

Appendix D

ISSUES OF THE UNITED STATES

The United States has examined the issues set out in the body of the pre-trial order and those proposed by other parties to this litigation and has no other issues to propose. By not setting out a specific list of issues, the United States does not admit that all of those issues proposed by the other parties are relevant; it merely is stating that all possible issues, in its opinion, have been stated.

APPENDIX O

Judgment of the Court of Appeals for the Tenth Circuit Entered March 2, 1971

JANUARY TERM - MARCH 2, 1971

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth, and Honorable Robert H. McWilliams, *Circuit Judges.*

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

The caption to the above-numbered causes was adopted in a court-approved stipulation. These eighty-eight (88) cases came on to be heard from a judgment entered in eight (8) consolidated civil actions, all filed in, or transferred to, the United States District Court for the District of Kansas. They were argued by counsel to the Court for two (2) days.

On consideration whereof, it is ordered that the judgment of said United States District Court for the District of Kansas is severally affirmed in the above actions Nos. 367-69, 368-69, 375-69, 376-69, 383-69, 384-69, 393-69, 394-69, 401-69, 402-69, 490-69, 491-69, 498-69 and 499-69.

Upon consideration of the remainder of the actions, namely, Nos. 307-69, 308-69, 309-69, 310-69, 311-69, 312-69, 313-69, 314-69, 315-69, 316-69, 317-69, 318-69, 319-69, 320-69, 321-69, 322-69, 361-69, 362-69, 363-69, 364-69, 365-69, 366-69, 369-69, 370-69, 371-69, 372-69, 373-69, 374-69, 377-69, 378-69, 379-69, 380,69, 381-69, 382-69, 385-69, 386-69, 387-69, 388-69, 389-69, 390-69, 391-69, 392-69, 395-69, 396-69, 397-69, 398-69, 399-69, 400-69, 486-69, 487-69, 488-69, 489-69, 492-69, 493-69, 494-69, 495-69, 496-69, 497-69, 500-69, 501-69, 502-69, 503-69,

504-69, 505-69, 506-69, 507-69, 508-69, 509-69, 510-69, 511-69, 512-69, 513-69, 514-69, and 515-69, it is ordered that the judgments of said Court are severally reversed and the cases are remanded to the said District Court for further proceedings, in conformity with the opinion.

It is further ordered that, within fourteen (14) days from March 2, 1971, or such further time as the Court may allow, the parties shall present their itemized and verified Bills of Costs, if any, and whatever statements that they may care to make in regard to the division and assessments of costs. The assessment of costs is to be the subject of future action by this Court.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk.

APPENDIX P

Order of the United States District Court for the District of Kansas, Dated April 21, 1964

(Filed April 21, 1964)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. KC-1969 (Consolidated with Civil Actions Nos. KC-1945, KC-1946, KC-1947, KC-1948 and KC-1980)

NORTHERN NATURAL GAS COMPANY, et al.,
Plaintiffs,

vs.

RALPH GROUNDS, HENRY HITCH, JR., et al.,
Defendants.

Civil Action No. KC-1945

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

vs.

MOBIL OIL CORPORATION, et al.,
Defendants.

Civil Action No. KC-1946

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

vs.

ASHLAND OIL AND REFINING COMPANY, et al.,
Defendants.

Civil Action No. KC-1947

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

vs.

COLUMBIAN FUEL CORPORATION, et al.,
Defendants.

Civil Action No. KC-1948

CITIES SERVICE GAS COMPANY, et al.,
Plaintiffs,

vs.

PAN AMERICAN PETROLEUM CORPORATION, et al.,
Defendants.

Civil Action No. KC-1980

NATIONAL HELIUM CORPORATION,
Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, et al.,
Defendants.

ORDER

NOW on this April 20, 1964, all parties to this proceeding appearing by their counsel of record, the Court having heard argument with respect to the various motions pending in the above cases, and being fully advised in the premises, finds and orders:

(1) That leave is hereby granted Ashland Oil & Refining Company to intervene as a party defendant in Civil Action No. KC 1969, and its Answer and Cross Petition attached to its Motion for permission to intervene shall

be deemed filed herein, to which all other parties to said action may have 20 days in which to plead.

(2) That all motions in behalf of Oliver S. Brown and other individuals for leave to intervene in actions numbered KC 1945, KC 1946, KC 1947, KC 1948, KC 1969 and KC 1980, and the motions to bring in additional parties defendant filed on behalf of Ralph Grounds, et al. in actions numbered KC 1945, KC 1946, KC 1947, and KC 1948, together with National Helium Corporation's Motion to add parties in action numbered KC 1980, should be sustained, and the parties named or designated in each such motion should be and are hereby permitted to intervene and are made additional parties defendant in the particular action to which such motion refers, as follows:

(a) In this respect with regard to actions numbered KC 1945, KC 1946 and KC 1947, Oliver S. Brown, Harry Lightcap, T. A. Dudley, Dan C. Sullivan, Jr., L. F. Roderick, Stanley Julian, E. W. Campbell, Herbert Foster, Fred Shore, Gerald Finley, A. W. Klassen, John Alford, Robert Larrabee, Emil Schnellbacher, Wylie Gore, George Anderson, Ora Martin, Gene Cyr, Carl F. Matzen, Lawrence Perrill, Robert Perrill, Verna Perrill Todd, Ariel Smith Perrill, William R. Joslin, Harlin Perrill, Ina Lamer Williams, Evelyn B. Cox, May Williamson, John H. Mayhue, Paul M. Baker, L. C. Waechter, J. C. Barden, Vernon Neff, Donald Neff, J. B. Adams, Robert M. Lamer, William R. Joslin, Dale Perrill, Louis Perrill, Margaret Perrill Burroughs, Marian E. Joslin, Andrews, Leslie Lamer, Charles Shorter, Selma Shorter, Marie E. Spires, Georgia Menn, Roy E. Menn, Fay P. Ross, A. D. Schowalter, Leland E. Nordling, C. S. Clayton, Fred L. Rogers, E. A. Pfeiser, Chester C. Clark, Lena M. Clark, J. T. Lear, W. V. Pintle, Rolland Jacquiort, O. A. Schoff, William Broadhurst, Iden R. Snyder, Pauline C. Fellers, F. A. Fellers, Ivan B. Irwin,

Harry A. Wilson, Oleta Wilson, M. B. Flowers, Kendel C. Smith, B. Frank Hartley, C. O. Snyder Estate by Iden R. Snyder, William H. Berry, Charles R. Anton, Byrl Staley, Elwin E. Anthony, Max R. Miller, T. M. Downey, Claude L. King, Thurow Bros. by O. W. Thurow, H. W. Wonn, Frank N. Schartz, Cecil R. Hinshaw, T. F. Moor, Ernest R. Downie, Fern Ulsh, J. A. Headrick, H. B. Davidson, James T. Klepper, Gene Stevens Estate, J. Clair Stevens, Agent, Crosby Stevens, Locke Hershberger, Hazel Hall, N. S. Robinson, W. F. Harkrader and B. V. Hampton, Trustees of Lora E. Porter Estate, Charles G. Hayward, Edgar W. Jarvis, Winnifred Deyoe, Alma R. Pringle, Ora O. Byers, G. E. Fretz, Catharine Fretz, Laura A. Wright, Charles H. Larson, Edna C. Millard, Carl E. Bentrup, Vivian I. Heminger, Leander Lightcap, Pete J. Harms, Florence King Garton, Mathilda Weber Schartz, Frank N. Schartz, Guardian, P. J. McGannon, Everett V. Schoonover, Rollo G. Ulsh, Clifford W. Stone, Wilbur Kennett, M. W. Congdon, Elma J. Klepper, J. Clair Stevens, The Great American Life Ins. Co., A. C. McConnel, Pres. and Treas., J. H. McMorran, Raymond A. Damerell, Edna E. Kellam, Carice B. Hayes, Roy R. King, Raymond E. Hardesty, Helen Davies, George H. Anderson, Hazel O. Swanson, A. P. Timmons, Rosena Novotny, C. B. Campbell Verla Webb, Mary Light, Fred L. Brown, Elizabeth H. Downie, Nancy Garretson, C. E. Prine, Mary S. Matzen, Maud Colingwood Trust Estate, c/o David J. Wilson, Meade S. McMillan, Earl D. Lambert, Virginia E. Pinnick, Troy Skinner, Sadie D. Schowalter, James Hershey, Charles C. Pottorff, J. W. Harrison Estate by D. Ruth Harrison, Robert F. Harrison, Ruth L. Harrison, Genevieve Combes, Loyde A. Gerber, Violet Grubbs, Carol J. Cox, Elvera Ruch, Perle Stone, C. H. Kimes, Nina Crosley, Frances Y. C. Warner, Ruth B. Edwards, Leslie R. Diehl, Arthur D. Young, N. C. Case, Sylvia C. Swanson, Kenneth R. Grigsby, W. D. Cailef, S. R. Webb, James E. Light, Herbert Foster, J. B. Ungles,

Louise Powell, Ben F. Brack, Zana Madden Prine, Charles D. Taylor, David J. Wilson, Herschel C. Logan, Floyd V. Pinnick, C. M. Light Estate, Charles M. Light, Jr., Trustee, George A. Light, Trustee, Arbie A. Schowalter, W. O. Kelman, W. H. Brennaman, R. W. Tuttle, M. L. Russell, Glenn A. Lehmann, Frank H. Scott, Ralph Grubbs, James M. Cox, T. D. Presley, Mrs. E. B. McConnell Estate, Mrs. Fred Gunzenhauser, Executrix, Lloyd Costley, Mrs. C. H. Kimes, John R. Moore, Minna Jenkins Estate c/o Lillie Snare, C. E. Eagle, G. W. Sitton, Gail Lahey, John M. Hardwick, A. E. Stecher, Dale Blair, C. A. Piper, Carl F. Hatterman, Jane V. N. Smead, A. E. Lahey, Fred E. Suits, agent, H. H. Stecher, W. C. Stecher, and James M. Cowgill have by intervention become additional parties defendant therein.

(b) In this respect with regard to action numbered KC 1948, Oliver S. Brown, Harry Lightcap, T. A. Dudley, Dan C. Sullivan, Jr., L. F. Roderick, Stanley Julian, E. W. Campbell, Herbert Foster, Fred Shore, Gerald Finley, A. W. Klassen, John Alford, Robert Larrabee, Emil Schnellbacher, Wylie Gore, George Anderson, Ora Martin, Gene Cyr, Carl F. Matzen, Lawrence Perrill, Robert Perrill, Verna Perrill Todd, Ariel Smith Perrill, William R. Joslin, Harlan Perrill, Ina Lamer Williams, Evelyn B. Cox, May Williamson, John H. Mayhue, Paul M. Baker, L. C. Waechter, J. C. Barden, Vernon Neff, Donald Neff, J. B. Adams, Robert M. Lamer, Dale Perrill, Louis Perrill, Margaret Perrill Burroughs, Marian E. Joslin Andrews, Leslie Lamer, Charles Shorter, Selma Shorter, Marie E. Spires, Georgia Menn, Roy E. Menn, Fay P. Ross, A. D. Schowalter, Leland E. Nordling, C. S. Clayton, Fred L. Rogers, E. A. Pfeiser, Chester C. Clark, Lena M. Clark, J. T. Lear, W. V. Pintle, Rolland Jacquiort, O. A. Schoff, William Broadhurst, and Iden R. Snyder have by intervention become additional parties defendant therein.

(c) In this respect with regard to actions numbered KC 1969 and KC 1980, Oliver S. Brown, Harry Lightcap, T. A. Dudley, Dan C. Sullivan, Jr., L. F. Roderick, Stanley Julian, E. W. Campbell, Herbert Foster, Fred Shore, Gerald Finley, A. W. Klassen, John Alford, Robert Larrabee, Emil Schnellbacher, Wylie Gore, Georgie Anderson, Ora Martin, Gene Cyr, Carl F. Matzen, Lawrence Perrill, Robert Perrill, Verna Perrill Todd, Ariel Smith Perrill, William R. Joslin, Harlan Perrill, Ina Lamer Williams, L. C. Waechter, J. C. Barden, Vernon Neff, Donald Neff, J. B. Adams, Robert M. Lamer, Dale Perrill, Louis Perrill, Margaret Perrill Burroughs, Marian E. Joslin Andrews and Leslie Lamer have by intervention become additional parties defendant therein. In addition thereto, with respect to action numbered KC 1980 alone, A. E. Kramer and George Drew are hereby made additional parties defendant.

(3) Thereupon, the individual defendants withdrew their motions to bring in as an additional party defendant Cities Service Helex, Inc., in actions numbered KC 1945, KC 1946, KC 1947 and KC 1948; and Cities Service Helex, Inc., voluntarily entered its appearance herein as plaintiff and hereby is added as a party plaintiff in each of said actions; and said plaintiff agrees to file its bond in each such case pursuant to 28 USC 1335, the amounts of such bonds at this time to be the same as the amounts of the bonds heretofore fixed by this Court for Cities Service Gas Company in the preceding cases. In this respect, Cities Service Helex, Inc. agrees that the subject matter of this controversy as contemplated by the interpleader statute is a fund or obligation arising out of the claim of ownership under the mineral leases or other contracts of the helium produced, marketed, and processed by any of the parties to this suit, and that neither the pleadings filed on behalf of such plaintiffs nor the bonds filed by them herein will limit the amount of nor the basis for any judgment which might be entered in such action. The identification of the subject

matter stated above is based upon notice pleadings and is without prejudice to a further determination of the subject matter and the issues during the subsequent course of these proceedings.

(4) All of the foregoing cases are consolidated with the action Northern Natural Gas Company and Northern Helex Company vs. Ralph Grounds and Henry Hitch, et al., number KC 1969.

(5) Defendants, and each of them named and as described in each of the foregoing actions and as enlarged by this order, individually, and as representatives of the class to which they belong be and they are hereby restrained and enjoined from instituting or prosecuting any proceeding in any state or United States court, except this court, affecting the property, instrument or obligations involved in any of the actions herein until the further order of this Court; provided, however, that nothing in this order contained shall be construed as in any way restraining or enjoining the plaintiffs in the case of Ralph Grounds and Henry Hitch, Jr., et al., plaintiffs, vs. The United States of America, Case number CIV 63-364, pending in the United States District Court for the Western District of Oklahoma, from applying in said court to transfer said cause to this court by any appropriate legal means.

(6) It is further by the Court ordered that if, as, and when said case now pending in the Western District of Oklahoma is transferred to this District, such case shall be and become consolidated with the other cases herein consolidated.

(7) That with respect to all answers and cross petitions permitted to be filed herein by additional parties brought in by this order, each and all other parties shall have 20 days from the date hereof in which to plead thereto.

IT IS SO ORDERED.

APPENDIX Q

Opinion of the United States Court of Appeals for the Tenth Circuit, Ashland Oil, Inc., v. Phillips Petroleum Company, Dated November 14, 1979 (607 F.2d 335)

ASHLAND OIL, INC., Plaintiff-Appellant, Cross-Appellee,

v.

PHILLIPS PETROLEUM COMPANY, Defendant-Appellee, Cross-Appellant,

and

United States of America, Intervenor-Appellee, Cross-Appellant.

Nos. 79-1009, 79-1096 and 79-1108.
United States Court of Appeals, Tenth Circuit.
Argued July 18, 1979.
Decided Oct. 15, 1979.
Rehearing Denied Nov. 14, 1979.

Natural gas seller brought action to recover reasonable value of helium extracted by natural gas purchaser and sold to federal government. The United States District Court for the Northern District of Oklahoma, Luther L. Bohanon, Senior District Judge, 364 F.Supp. 6, entered judgment against natural gas purchaser and against government as intervenor, and defendant and government appealed while plaintiff cross-appealed as to ultimate division of proceeds derived from helium. The Court of Appeals, Seth, Circuit Judge, 554 F.2d 381, affirmed in part, reversed in part and remanded. On remand, the United States District Court for the Northern District of Oklahoma,

Luther L. Bohanon, Senior District Judge, 463 F.Supp. 619, found $3 value at wellhead for helium, and natural gas seller appealed. The Court of Appeals held that use of contract value for starting point in determining proper basis for valuation of helium at wellhead by use of work-back method was proper.

1. Gas (Key) 14.4(4)

In determining basis for valuation of helium at wellhead by use of work-back method, selection of the stated value of helium used in contract between natural gas purchaser and federal government as a starting point was proper.

2. Gas (Key) 14.4(4)

In action by natural gas seller to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government, factors which trial court included in plant cost figure of helium or in total "capital employed" upon which purchaser was intended to compute a return were fact-finding elements and result which trial court reached was supported by record.

3. Federal Courts (Key) 917

In action to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government, award of prejudgment interest on prior appeal was law of case.

4. Interest (Key) 39(3)

Under statute providing that interest allowed on money judgment in civil case be calculated from date of entry of judgment, in view of extent to which case was re-

versed, judgment for purposes of postjudgment interest was entered by trial court on remand rather than upon date of first judgment. 28 U.S.C.A. § 1961.

Gerald Sawatzky, Wichita, Kan. (John M. Imel, Tulsa, Okl., Arloe W. Mayne, Lillian Williams, Ashland, Ky., W. O. Strong, III, Houston, Tex. and of counsel, Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., Fulbright & Jaworski, Houston, Tex., and Moyers, Martin, Conway, Santee & Imel, Tulsa, Okl., on brief), for plaintiff-appellant, cross-appellee.

Don L. Jemison, Bartlesville, Okl. and L. K. Smith of Boone, Ellison & Smith, Tulsa, Okl. (Kenneth Heady and C. J. Roberts, Bartlesville, Okl., on brief), for defendant-appellee, cross-appellant.

John E. Lindskold, Dept. of Justice, Washington, D. C., for intervenor-appellee, cross-appellant.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

PER CURIAM.

This case was remanded for the development of additional facts relating to and to provide a basis for the valuation of the helium at the wellhead by the use of a work-back method. *See Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d 381 (10th Cir.). The trial court was to determine a proper starting place and value for such method, the plant cost, return on investment, the costs chargeable to production of liquid hydrocarbons, and related facts.

[1] On remand the trial court selected as a starting point the stated value of helium used in the contract

between Phillips and the Government. For a brief description of the contract, see 554 F.2d, at 384. This determination by the court was based on the expert testimony relating to pure helium values and other possible starting points for the valuation of helium. A starting place for the work-back method can be at any point in the production—processing—sale chain where a dollar figure can be established by reliable evidence, and which may be demonstrated to be a realistic value. We see no objection to the use of the contract value for this purpose. It was a negotiated figure arrived at by parties dealing at arm's length. There may have been other considerations involved, but on remand these do not appear to have been substantial enough to cast doubt for our purposes on the contract price. This figure was not greatly different from those used in the contracts for other extraction plants.

[2] Using this figure the trial court made findings as to plant investment and rate of return. These factual determinations were made after a consideration of the testimony and are supported by the record. The appellant urges that there are factors which should not have been included in the plant cost figure or in the total "capital employed" upon which Phillips was entitled to compute a return. However, again this was a fact-finding element, and the result was supported by the record.

The parties are in essential agreement as to the costs to be allocated to the production of liquid hydrocarbons. The trial court's figure on this element must be accepted.

[3] The rate of return is a departure from the figure used at the first trial, but this element was included in the remand and again is supported by the testimony of the several witnesses. It is within the fact-finding func-

tion of the district court. On the prior appeal we expressly approved the award of prejudgment interest. This factor was not in the remand and became the law of the case. Thus, as we previously held, plaintiff is entitled to prejudgment interest.

[4] The plaintiff urges that postjudgment interest should commence upon the date of the first judgment and not at the end of the remand trial. However, we must hold under 28 U.S.C. § 1961, in view of the extent to which the case was reversed, "the judgment" for the purpose of interest was that entered by the trial court on remand. *See Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir.).

The judgment is affirmed as to the three dollar value at wellhead for the helium, but is reversed as to prejudgment interest and remanded for the entry of a judgment to include such interest.

APPENDIX R

Opinion of the United States District Court for the Northern District of Oklahoma, Ashland Oil, Inc. v. Phillips Petroleum Company, Dated December 28, 1978 (463 F.Supp. 619)

ASHLAND OIL, INC., Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant,

and

UNITED STATES OF AMERICA, Intervenor.

No. 67-C-238.
United States District Court,
N. D. Oklahoma.
Dec. 28, 1978.

In a suit by a natural gas seller to recover the reasonable value of helium extracted by a natural gas purchaser and sold to the federal government, the District Court, Bohanon, J., on remand from a prior appeal, 554 F.2d 381, found that the value of the commingled helium for each and every year that it was produced, regardless of the plants from which it was produced, was $3 per thousand cubic feet.

Judgment fixing damages for plaintiff.

Gas (Key) 14.4(4)

In suit by seller of natural gas to recover from purchaser for value of commingled helium which was removed by purchaser and then sold to government, damages to be awarded plaintiff, arrived at by work-back

method of computation, would be calculated on basis of market value of commingled helium, for each and every year that it was produced and regardless of plant from which it was produced, of $3 per thousand cubic feet. Helium Act Amendments of 1960, §§ 1 et seq., 15, 50 U.S.C.A. §§ 167 et seq., 167m.

Gerald Sawatzky of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., John M. Imel of Martin Logan, Moyers, Martin & Conway, Tulsa, Okl., and W. O. Strong, III, Ashland Oil, Inc., Houston, Tex. for plaintiff Ashland Oil, Inc.

Don L. Jemison, Phillips Petroleum Co., Bartlesville, Okl., and L. K. Smith of Boone, Ellison & Smith, Tulsa, Okl., for defendant Phillips Petroleum Co.

John E. Lindskold, Dennis A. Dutterer and Andrew F. Walch, Dept. of Justice, Washington, D. C., and Hubert H. Bryant, U. S. Atty., and Hubert A. Marlow, Asst. U. S. Atty., Tulsa, Okl., for intervenor United States.

MEMORANDUM OPINION

BOHANON, District Judge.

Introduction

(*See also Findings Nos. 1-13*)

Plaintiff Ashland seeks compensation for helium contained in the natural gas stream acquired from plaintiff by defendant Phillips, which was subsequently extracted and sold separately to the United States government. Originally tried in 1973, this case was remanded on appeal to retry controlling factual issues. In the first trial plaintiff and defendants' legal theories and approaches were

sufficiently divergent to prevent a joining of issues. Consequently, crucial factual considerations were never fully developed evidentially. At retrial the significant factual matters were developed more fully and thoughtfully than before. Thus, the court must be amenable to discarding earlier erroneous conclusions. The interests of justice, aptly perceived by the circuit court opinion in this case, require no less.

In adjudicating this controversy a second time, the court was assisted by the appellate court's enunciation of certain controlling legal principles. The basic legal relationships among the landowners, producers and gas purchasers were established, notably including the lessee-producer's right to the reasonable value of the contained helium. *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir. 1971); *Ashland Oil, Inc. v. Phillips Petroleum Company* (hereafter *Ashland v. Phillips*), 554 F.2d 381 at 384 (10th Cir. 1975).

The prime responsibility of this court is to determine the reasonable value of the helium herein when commingled at the wellhead with other natural gas. *Ashland v. Phillips, supra* at 385-386. Such "value" is basically a factual matter to be ascertained through application of the appropriate legal doctrines. *Ashland v. Phillips, supra* at 385. Optimally, a product's "fair market value" is determinable by examining comparable sales of the same product. *Ashland v. Phillips, supra* at 387. Significantly, some sales of commingled helium offered in evidence here were too remote in time, and otherwise incomparable, to be relied on solely.

The "Work-Back" Method

The next best approach is the "work-back" or "value less expense" method whereby a raw material's value is extrapolated by using as a starting point an end product of that material whose value is certain. The costs of transforming the raw material from the stage where its value is unknown to that where its value is certain are subtracted from the starting value to reveal the value being sought.

> "The work-back valuation is well recognized in the production and early processing of natural gas. . . . There is nothing unusual about the method, it is subject to proof, and can be just as accurate as any other method, but it is more difficult to apply." *Ashland v. Phillips, supra* at 387.

Effective application of this method requires selection of an appropriate starting value in the form of a processing stage whose product possesses a value certain; accurate assessment of the costs accruing between the known stage and the one in question is also essential. In developing a resource from a raw material into a finished product, each production stage will add economic value to what was initially only the value of the raw material. The value added at each stage of production is essentially the cost of resources used in taking the material through that stage of production. The work-back method essentially establishes at each production stage the value of the product at that point. By subtracting out all production costs, the value of the raw material is revealed.[1] Application of this

1. "Yes, I am familiar with the workback method of discovering the value of a raw material where there are no comparable sales that can be used to attribute value to it. Essentially, as I understand it, if a raw material is scarce enough to command a price or to have an economic value, then, this raw ma-

(Continued on following page)

approach, however, can be difficult. Market structures vary at different production stages and correlating figures from one stage to the next can require abstruse analytical calculations, easily resulting in error. The selected starting point should be as close as possible to the production stage in question.[2]

With these theoretical considerations in mind, two potentially viable starting points emerge. One is helium in its crude form; the other is helium in its pure Grade A refined form, the starting point initially adopted by this court.

Refined Helium Market

(See also Findings Nos. 14-18)

If one fact has clearly emerged at retrial, it is the inappropriateness of using refined helium prices as a starting

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Footnote continued—

terial may go through several stages of production and production process to turn it into an end product. At each of the production stages, there will be value added to what was originally a value of the raw material. The value added at each stage of production is essentially the cost of resources used in taking the material through that stage of production.

Now, then, a workback amounts to determining at some stage, at some market, at one of the stages of production, what the value of the product up to that point really is. Then, we subtract out the costs and that should leave us with the economic value of the raw material, if the starting point is correct, if the workback is correctly done." (Tr. 368-369, Dr. Richard H. Leftwich, Regents Professor of Economics and former head of the Department of Economics at Oklahoma State University.)

2. ". . .[I]f you work back through several successive stages in going from one stage of the production process to another, there are likely to be errors involved, errors involved in computations. There will be errors involved because market structures differ at differing stages of production, and the more stages of production that you work back through, the more likely we are to compound these errors and to wind up with an erroneous computation, an erroneous value for the raw material. . . [I]t seems to me that the appropriate starting point is the closest identifiable market to the raw material." (Tr. 369-370, Dr. Leftwich supra)

See also the testimony of Dr. Ezra Solomon, Dean Witter Professor of Finance at Stanford University, at Tr. 418.

value in extrapolating commingled helium's value at the wellhead.

Possession of a production phase where the raw material has been processed to a point of possessing a value certain is crucial to the work-back method, whose efficacy is based on employing known data to extrapolate the unknown. Refined helium prices for the time period relevant to this case were not only distorted by monopolistic market conditions which prevented pure helium's prices from reflecting the product's "fair market value," but even more significantly there was never any relationship whatsoever established between the commingled helium in this case and any refined helium market.

All of the commingled helium in this case was processed into crude helium and placed in underground storage by the government, where it remains today. None has been refined into Grade A helium.[3] It was acquired with conservational intent and for consumption at some undetermined future time. Any suggestion that the helium in this case could have been refined and subsequently sold at then prevailing market prices of $20 to $35 per Mcf is at

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3. ". . . [T]he crude helium that has been put into the government's Cliffside field . . . was never produced to supply current demands. . . . We don't know when it's going to be used. We don't know what purpose it's going to be used for, and we don't know what price it's going to be sold for sometime in the future, when and if it's ever used. . . .

So, it's setting there, and it's in the Cliffside field, and there is 36 billion cubic feet of it. Now, 2 billion cubic feet of that was put in there by the Bureau of Mines, so only 34 billion cubic feet represents helium that was obtained from the conservation companies . . . ." (Tr. 321-322, Henry P. Wheeler, Jr., former Assistant Director to the Bureau of Mines responsible for the government's helium conservation program)

"Q Of all of the helium acquired under the conservation program is all of it in storage at Cliffside?

A Yes, it is." (Tr. 283, 284, Ray D. Munnerlyn, Chief of the Helium Division of the Bureau of Mines)

variance with what the most persuasive evidence before this court demonstrates to be the truth.[4]

Refined helium prices during the period in question consistently were distorted by effects of a monopolistic seller's market and never were determined by free and open competition. Government prices based on long-term policy considerations completely dominated the market in the initial years significant to this case, and were influential throughout the entire course of the pertinent time period. Introduction into the refined helium market of even a small percentage of the large helium quantities at issue here would have plummeted prices industry-wide, not only because any reasonable competition would have constituted an effective assault on the then prevailing artificially high price structure, but also due to the relatively inelastic helium demand at the time. Only a small number of end uses for refined helium exist, and those end uses can absorb only limited quantities of refined helium.[5] When a product is available in quantities greatly exceeding anything the market requires or can absorb, the excess amount is worth very little and will tend to severely depress prices, as competition forces sellers to unload their product for virtually anything they can get.[6]

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4. ". . . Ashland's calculations assume that if more crude had been refined, that the price would not have changed. Basic economic principle called the law of demand tells us that this is false, and the numerical analyses that I have just gone through show just how false this kind of an assumption, an underlying assumption can be. Because only a very small increase in the quantity of crude refined would lead to a relatively large decrease in the price of the Grade A helium." (Tr. 794, Dr. Ronald Braeutigam, Professor of Economics at Northwestern University)

5. "There are a small number of end uses of refined helium and each of these end uses can absorb only limited quantities of refined helium." (Tr. 386, Dr. Leftwich, supra)

6. "We could have gone out and been very hard bargainers, playing one of these companies against the other, because obviously some of them are going to get something for their helium and some of them were not . . . ." (Tr. 324, Wheeler, supra)

Large quantities of crude helium were produced and sold in the United States during the years in question. In comparison, very small quantities of refined helium were bought and sold. In light of the inelasticity of demand for refined helium, and the marked disparity volume-wise between crude and refined helium, the best evidence indicates that a 1 percent increase in the refinement of available crude helium would have led to a drop in refined helium prices of at least 5 percent, and possibly in excess of 9 percent, depending on the year chosen.[7] Introduction of a large quantity of such helium into the market would have driven the price down to near zero.[8]

The salient fact questions herein can in no manner be resolved by reference to the refined helium market. The helium here was never refined, and it never influenced or was affected by any refined market. Simply stated, in this case refined helium prices represent an inappropriate and unsatisfactory starting point for application of the work-back method. The best evidence repeatedly emphasizes the ineffectiveness of attempting to infer the value of large quantities of crude or commingled helium, based

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7. ". . . [T]he volume of the crude helium was something like five to nine times the volume of the helium in the Grade A market, depending on which year you pick. So, for example, if we were to take one percent of the crude in any given year that had been produced and convert that to Grade A, then, you would get from five to nine percent change in the quantity of Grade A helium. And using this information on elasticity of demand, we conclude that the one percent increase in the quantity of crude which is refined would lead to a drop in price in the Grade A market, at least five percent, and maybe even more than nine percent, depending on the year we pick." (Tr. 793, Dr. Braeutigam, supra)

8. "If a very large quantity of Grade A helium or refined helium were thrown on the market, this would drive the price down to near zero." (Tr. 387, Dr. Leftwich, supra)

upon the relatively small number of refined helium market transactions.[9]

Crude Helium Market

(*See also Finding No. 19*)

The other potential starting point for application of the work-back method is the crude helium market. It represents the first processing stage at which helium *per se* is freely marketed and the first form into which commingled helium is separated. The close proximity of the two stages makes work-back calculations easier and more reliable. During the relevant years, crude helium production was much more comparable in quantity to commingled helium production than was refined helium production, and all the helium at issue was sold and maintained in crude helium form. The crude helium market was by far the largest helium market existent during the pertinent ten year period. Beginning the work-back method

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9. "It is simply not proper to infer the value of a large amount of crude helium, based upon the small amount of helium in the Grade A market. And to illustrate this. Suppose we did start with that $20 price of Grade A helium and suppose following the workback method we subtracted off the cost of converting crude helium to Grade A helium to arrive at some kind of net price for crude helium. The next step in the workback method then would be to try to compute a value for all of that crude helium, and this would be done by taking the net price that we calculated and multiplying it by the quantity of crude. The problem which arises is simply this. It imputes a value to all of the crude helium, based upon the $20 attached to only a very small volume in the Grade A market. In other words, the method that was proposed by Ashland assumes, in principle, if not in fact, that we could have refined all of that crude helium and sold it in the Grade A markets and that the price would not change from $20. This violates the fundamental law which economists call the law of demand, namely, we know that if the quantity of Grade A helium had been larger, that the price would have dropped. And this is exactly the point that Ashland has ignored in coming up with this workback method and applying the $20 figure as though we can impute a value to all of that crude helium based on that quantity, which is very small in the Grade A market." (Tr. 789-790, Dr. Braeutigam, supra)

here would allow us to make computations on the basis of events and transactions which actually occurred, and would minimize the need for speculation of the type refined helium figures require.

Supply and demand characteristics of the crude helium market were similar in size and structure to those which would have attended a commingled helium market if one had been independently identifiable, and the comparability of these economic factors makes comparisons between the commingled and crude stages much more realistic than comparisons with the refined stage.

Several factors made crude helium prices more representative of helium's fair market value at that level than pure helium prices were at the refined level. When the conservation program was initiated, a great many potential sellers received notice from the government of its intention to buy crude helium, and some 13 or 14 companies expressed interest in contracting as crude helium suppliers. The contracts which finally emerged, including Phillips' contract, followed extensive "good faith" and "arm's length" negotiations. The price paid for crude helium to the "Helex" companies, including Phillips, averaged about $12 per Mcf. While the evidence reveals that the crude helium market was not a perfectly competitive market in the classical economic sense, throughout most of the relevant period there were at least four sellers in the market, dealing at prices freely negotiated, and substantial amounts of crude helium were exchanged within a fairly narrow range of prices.[10] This market was at least imperfectly

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10. "I think that to start with we have a market which I would not characterize at the crude level as being a perfectly competitive market, certainly, in the classical economic sense. However, we do have throughout most of the time period I'm talking about evidence that we had at least four sellers in that market, and they were entering into contracts at prices which were

(Continued on following page)

competitive and significantly more competitive than the refined market. A rather well developed crude helium market existed, then, during the time period relevant here, generally operating within a price range of $11.00 to $14.00.

Phillips Contract Price

Since the evidence of both Ashland and defendant Phillips offers work-back calculations based on Phillips' actual extraction costs, employing Phillips' actual contract price as a starting value would be ideal if shown to represent a fair and reasonable price for crude helium.[11] The Phillips contract was one of four negotiated with the four "Helex" companies and, like the others, resulted from extensive "arms length" negotiations. The court is now persuaded that Phillips' contract price of approximately $10.30 per Mcf represented a fundamentally fair and reasonable price for crude helium. This contrasts with the first trial, wherein the evidence demonstrated no relationship between the negotiated contract price and the fair market value of the helium. *See Ashland v. Phillips, supra* at 384.

Footnote continued—

not dictated, either by the government or by anyone else. They were freely negotiated prices. I would characterize the market as perhaps imperfectly competitive . . . ." (Tr. 801, Dr. Braeutigam, supra)

"So with these exchanges and very very substantial amounts of crude helium being exchanged, within a fairly narrow range of prices, I think there is no question but what we had a very good market for crude helium existing." (Tr. 375-376, Dr. Leftwich, supra)

11. ". . . [S]ince the workback cost figures that are being used in this case are Phillips' cost figures, Phillips' workback cost figures, then it appears to me that they ought to be applied to a Phillips' price, rather than taking Phillips' cost figures and applying it to some nebulous overall price. If we are going to use Phillips' costs, let's use Phillips' price to do our workback." (Tr. 391, Dr. Leftwich, supra)

Ashland's argument that the contract figure did not represent the full and complete helium "price," due to the contract's indemnnity clause, is persuasive on its face but was shown at retrial to be factually unsound. At issue is contractual provision 7.4 of the Phillips contract, wherein the government agreed to indemnify Phillips for amounts in excess of $3.00 paid to third parties for their helium ownership rights. Such provision implies that the complete crude helium price was contemplated to be the base figure of approximately $10.30 plus additional payments required by third party ownership interests. The evidence now establishes that the base figure was considered by the parties to be the full and complete price for the crude helium and that it, in fact, constituted a fair and reasonable price. Phillips' negotiators had been advised by legal counsel that Phillips possessed sole and complete title to all of the contracted helium. Phillips was willing to so warrant its title and was intent on negotiating a contract price reflecting the full and complete value of the crude helium. Approximately half of the helium Phillips contracted to sell was produced from its own gas wells and indisputably belonged to Phillips, and the base contract figure unquestionably represented full payment as to this one-half.[12] Significantly, the indemnification clause was never requested by Phillips, and was never a focal point of negotiations, but was merely inserted at the government's behest to provide continuity with previously negotiated contracts containing the same clause.

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12. ". . . [I]n the case of Phillips, one-half of its total crude sales to the government consisted of commingled gas that was not subject to the indemnity provision. And the price they sold that half at was no different than the price they sold the other half at, which did have something to do with the indemnity provision, which would suggest to me that they could not have given a great deal of weight to that provision in determining the negotiated price they settled on." (Tr. 423, Dr. Solomon, supra)

Ashland's contentions that the negotiated contract price was depressed by the potential threat of government condemnation of the helium is not supported by the record. The negotiated price essentially represented that dollar figure necessary to induce Phillips to bring forth the amount of crude helium the government wanted to purchase from Phillips.[13] Any evidence indicating a variance between the contract price and the helium's worth would seem to indicate that perhaps the price was slightly too high, since Phillips' bid was accepted for reasons influenced by conversation considerations even though slightly higher than one of its competitors.

Processing Costs

(*See also Findings Nos. 25-31*)

In computing a cost figure to be applied in the work-back method, this court was directed on remand to receive further evidence on, *inter alia,* the appropriate amount chargeable to costs as a return on investment and the amount of helium plant expense properly allocable to production of hydrocarbons and thus not properly chargeable to costs. Having determined that a 15 percent rate of return on investment is appropriate for reasons detailed in the court's attendant findings of fact, and having adjusted the cost figures to allow for hydrocarbon expenses, the court has examined computations based on crude helium values, including Phillips' contract price, in comparison with Phillips' actual costs. The court believes that the fair market value of Ashland's helium at the crude helium stage was in the vicinity of $10.50 to $12.00 per

13. "[The Phillips contract price] was a price that was necessary to induce Phillips to bring forth the amount of crude helium that the government wanted to purchase from Phillips." (Tr. 391, Dr. Leftwich, supra)

Mcf. Phillips' actual extraction costs during this period averaged out between $6.50 and $7.00 per Mcf. at Sherman, and slightly in excess of $10.00 per Mcf. at Dumas. Selecting a range of costs between $6.50 and $8.00 per Mcf as being fair, the workback method reveals that Ashland's recovery should be between $2.50 and $5.50 per Mcf.

Exact Computations

No automatic and exact solution to the problem of valuing commingled helium simplistically emerges from application of the work-back method to the relevant data. A rigid statistical approach preoccupied with mathematical precision would generate rather widely differing values for different "shipments" of commingled helium, depending upon the year of production and the processing plant utilized.[14] Even then such precision could be attained only by delineating an artificially exact crude helium value as a starting point.

The exact contract price between Phillips and the government varied from year to year and plant to plant. The $10.30 price referred to earlier is less expressive of a precise crude helium value than it is of a figure located within a reasonable range of crude helium values. The work-back method reveals only that the commingled helium in this case should be valued somewhere between $2.50 and $5.50 per Mcf, depending upon the comparative weight assigned to the various relevant statistics.

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14. Strict application of the work-back method would indicate that helium processed through the Sherman plant was worth $2.22 more at the wellhead than helium processed through the Dumas plant (See Tr. 930. John C. Dunn, Economic and Financial Consultant)

Quantum Meruit

Recovery in this case rests upon the doctrine of "quantum meruit," wherein the law implies an agreement and allows recovery of "what is reasonable" and what one "reasonably deserves" for benefits conferred in the absence of an express contract. *Brown v. Wrightsman,* 175 Okl. 189, 51 P.2d 761, 763 (1935) "Quantum meruit" applies where actual contractual intent and mutual assent by the parties is lacking; compensation is afforded based upon reason and justice. *Hillyer v. Pan American Petroleum Corporation,* 225 F.Supp. 425 (N.D.Okla.1963). This rule of law stresses the inequity of a party refusing to pay for benefits received knowingly and with consent, from someone lawfully authorized to expect remuneration therefor. *Kramer v. Wilson,* 226 S.W.2d 675 (Tex.Civ.App.1950); *Parks v. Kelley,* 147 S.W.2d 821 (Tex.Civ.App.1941).

Fair Market Value

(*See also Findings Nos. 32-35*)

The economic value of commingled helium is not as high as evidence at the first trial led the court to believe. It is not, on the other hand, inconsequential. The circuit court of appeals has correctly emphasized that helium has value by reason of its nature and usefulness, and that the government's conservation program may have preserved such value and made it available, but it did not create such. *Ashland v. Phillips, supra* at 389.

Significantly, however, the evidence at retrial established that helium's uses are limited and its demand is relatively small. This helium demand consistently has been dwarfed by the size of potential supplies. During the period of the helium conservation program and in the years immediately thereafter (1963-1977) only about

40 percent of the helium produced in helium-rich natural gas was recovered. Since the conservation program was completed, approximately 80 to 90 percent of the helium produced from the major helium-rich gas fields has been discarded at the wellhead and allowed to escape to the atmosphere due to the absence of a viable market.

Even in 1968, during the peak of the helium conservation program, 8.36 billion cubic feet of helium was produced in natural gas, but only 4.59 billion cubic feet was recovered. 3.77 billion cubic feet was vented into the air.

Over 188 billion cubic feet of commingled helium in proved probable reserves of helium-rich gas (containing 0.3 percent helium or more) had been identified as of 1977. An additional 171 billion cubic feet of helium commingled in reserves of less-rich natural gas (containing less than 0.3 percent helium) has been identified. This reserve total of 359 billion cubic feet of commingled helium compares with helium consumption in 1977 totalling 0.9 billion cubic feet.[15]

The helium owners in this case were fortunate that their helium was selected to be conserved. Most of the nation's helium owners possessed no opportunity to sell at any price and received no compensation whatsoever for their helium. While plaintiffs are entitled to "reasonable compensation," this amount must fairly equate with the helium's "fair market value."

A market exists wherever two or more parties contact one another to engage an exchange, and where the parties agree on the terms thereof. The "faor market value" of an item is reflected in the price at which both buyers and sellers are willing to engage an exchange, and the price at which

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15. United States Exhibit No. 28

neither shortages nor surpluses will occur. It is the price at which sellers are induced to bring to market those quantities that buyers are willing to buy at that price. Normally, for a "market" and a "fair market value" to exist, the market price must be sufficient to cover costs of production and a normal profit to the sellers.[16]

Henry P. Wheeler, Jr., former Bureau of Mines employee in charge of the helium conservation program, and the government negotiator with the Helex companies, testified that the government could have purchased all of the commingled helium it desired for $2.00 per Mcf.[17] This analysis is generally supported by the record, including evidence of market conditions existent at the time.

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16. ". . . [A] market exists wherever two or more parties contact one another to engage an exchange, and where the parties agree on the terms of exchange." (Tr. 370, Dr. Leftwich, supra)

" . . . [T]he market value of any item is reflected by the price at which both buyers and sellers are willing to exchange the item and a price at which neither shortages, nor surpluses, will occur.

Now, I would like to observe further here that the market value of an item is a price at which sellers are just induced to bring to market the quantities that buyers are willing to buy at that price. In other words, the value or the market price of an item must be sufficient to cover cost of production and a normal profit to the sellers, to the producers and the sellers.

The contract prices as a group that the conservation companies received from the government I think must be very close to a market value for crude helium. I think they must be very close to what a competitive price would be." (Tr. 376-377, Dr. Leftwich, supra)

17. ". . . I would say that any application of any theory which comes out with an answer which is much different from $2, either plus or minus a little bit, there is something wrong with the method, because it does not adequately reflect the situation that existed at the time.

Q And why do you say that, sir?

A I was there, I knew what it cost to go out to get helium-bearing natural gas, and I know that I could have gotten all we wanted for $2, or less, and that's what it was worth." (Tr. 337-338, Wheeler, supra)

In negotiating with Helex companies, government negotiations employed a "work-up" method to value the commingled helium. Similar in principle to the "work-back" method, this approach added cost increments to a selected wellhead starting value in order to arrive at the crude helium's reasonable value. This "work-up" method, whose results provided the bases for the resulting contracts, was predicated on the use of a $2.00 per Mcf value for helium at the wellhead. (See Phillips' Exhibit 71). Dr. Leo Garwin, plaintiff's own expert witness, recognized commingled helium's value during the years in question as being between $2.00 and $3.00.[18] Also, at least one 1966 sale between private parties utilized a $2.00 per Mcf. Price.[19]

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18. Tr. 838-848. Dr. Leo Garwin, Consulting Engineer. See finding of fact No. 35.

19. Q. "Now, did Kansas-Nebraska enter into an agreement with Cities Service . .?

A. Yes, sir, there is a—there is a provision in the processing agreement for a payment for the right to extract the helium.

Q. All right, sir. Do you recall what that payment—

A. Yes, sir, its $2.00 per mcf.

Q. Of contained helium?

A. Yes, sir.

Q. Is that contained helium extracted?

A. Extracted, yes, sir.

Q. And can you tell the court generally how the $2.00 price was arrived at?

A. My memory is that at the time we were negotiating that arrangement with Cities, we only had one pattern to go by, which was a contract between Colorado Interstate and the government at the Keyes, that's K-e-y-e-s, plant, and that was $2.00. We were willing to accept that and Cities was willing to pay that, so that's what we arrived at.

Q. All right, sir. And do you recall about what year that would have been in?

A. I think that was probably about 1966, I guess."

(Tr. 14-15. Defendant Phillips' Exhibit No. 39. Deposition of S. D. Ford, Jr., vice president of production and gas supply with Kansas-Nebraska Natural Gas Company)

Plaintiff's efforts to predict an eventual high economic value for helium possess little dependability or relevance to this case's issues. Estimates of future demand for most commodities, including helium, are less than reliable.[20] In any event, plaintiff's measure of recovery is tied to commingled helium's value as computed at the time of Phillips' sale. Speculation portends that exorbitant prices may eventually attach to such natural resources as land, water, wood and perhaps even clean air, yet their present economic value is governed by present availability rather than potential future scarcity.

A full and careful review of the record in this case reveals a myriad of considerations relevant to an appropriate valuation of Ashland's helium commingled at the wellhead, none of which, however, individually establish an exact dollar figure. The full range of reasonable values disclosed by the proper application of "work-back methodology, the structure and salient economic factors of the various helium markets during the period in question, the expert testimony of record, and the equitable considerations collectively suggest that the reasonable value of the commingled helium in this case is between $2.00 and $3.00 per Mcf regardless of the year of production or the extraction plant utilized.

This determination, and the bases therefor, are hereinafter detailed.

In addition to the findings and conclusions in the preceding text, and by way of elaboration thereon, the court delineates the following:

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20. "Estimates of the future demand of any commodity are notoriously unreliable and helium is no exception." (Plaintiff's Exhibit 2-31, p. 16, A Report to the President and the Congress of the United States on the Energy-Related Applications of Helium and Recommendations Concerning the Management of the Federal Helium Programs. See also Tr. 982)

FINDINGS OF FACT

Introduction

1. Helium is an unusual element; it is a gas which is inert and noncombustible and is the second lightest known element. Helium is so inert that it will not chemically react or combine with other elements and thus remains as helium forever. It is tasteless, colorless, odorless and invisible. For a more complete description of helium, its unusual characteristics, its uses, and where found, etc., see *Northern Natural Gas Co. v. Grounds, supra* and in the opinion of U. S. District Judge Wesley E. Brown, 292 F.Supp. 619 (D.C.Kan.1968).

2. In the 1940's, the United States Bureau of Mines was the sole producer of helium in the nation, and it purchased commingled helium in the pipeline at the same price as the natural gas itself, ranging from 5 to 8 cents per Mcf.[21] In the late 1950's the Bureau of Mines purchased helium contained in natural gas in the pipeline for its Keyes plant operation at the price of approximately $2.00 per Mcf contained helium; the Bureau of Mines was willing to pay a premium price for the gas because of the high helium content (2.0 percent rather than 0.5 percent contained helium) which resulted in savings in production costs.

3. Pursuant to the authority granted by Congress in the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.), the United States entered into long-term crude helium purchase contracts with four companies, the "Helex" companies, to construct plants for the extraction of helium from natural gas streams being produced from the Hugoton-Panhandle area. Each of the contracts was executed on a

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21. One Mcf is one thousand (1,000) cubic feet.

different date, had three different initial unit prices per Mcf during each year of the contract for the life of the contract. The maximum annual obligation for each contract was different under the limitations imposed by Congress, i. e., only the sum of $47.5 million could be expended annually to buy helium under the Government's program to conserve helium. A summary of the contracts is set forth in Table 1 below:

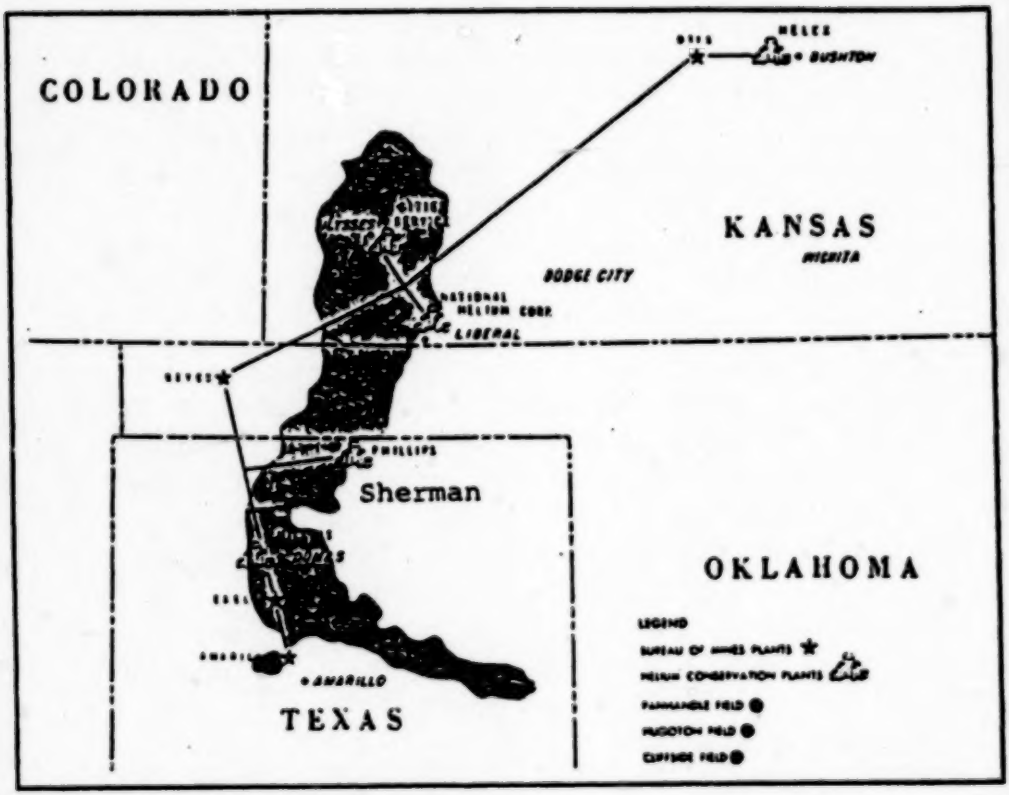
TABLE 1

SUMMARY OF HELIUM CONSERVATION CONTRACTS

Company	Plant Location and Date of Contract	Initial Unit Price (for 1,000 cubic feet)	Maximum Annual Obligation (million dollars)	Estimated Helium Volume (million cubic feet)	
				Annual Average	Life of Contract
Northern Helex Company	Bushton, Kansas 8–15–61	$11.24	$9.5	675	13,500
Cities Service Helex, Inc.	Ulysses, Kansas 8–22–61	11.78	9.1	610	12,200
National Helium Corp.	Liberal, Kansas 10–31–61	11.78	15.2	1,053	21,060
Phillips Petroleum Company	Dumas, Texas) and Sherman Co.,) Texas 11–13–61	2 plants 10.30	13.5	788	15,760
Weighted average—$11.29					
TOTAL			$47.5	3,126	62,520

4. In addition to Phillips Petroleum Company, the last of the Helex companies to enter into a conservation contract with the United States, agreements for the purchase of crude helium were reached with National Helium Corp., Cities Service Helex, Inc., and the Helex Company (later Northern Helex Company).

5. The crude helium conservation system consists of 5 privately owned crude helium production plants, a main pipeline running from Bushtown Plant in Kansas to the storage site at the Cliffside field in Texas and lateral pipelines running from the main pipeline to certain Grade A helium production plants. Three of the conservation plants are located in Kansas: the Bushtown Plant of Northern Helex, the Jay Hawk Plant of City Service Helex and the Liberal Plants of National Helium. The plants at Sherman and Dumas, Texas, belong to Phillips Petroleum.



ESSENTIAL LINK in the nation's helium conservation program is a 353-mile pipeline constructed by the federal government in 1962 and connecting five privately owned and four government-operated extraction plants to an underground storage area in the Cliffside field near Amarillo, Tex.

6. Under the terms of its contract of November 13, 1961, Phillips agreed to sell the United States a helium gas mixture from two plants it proposed to build at Sherman and Dumas, Texas. The plants were constructed to extract for delivery and sale to the government, per the contractual terms, a helium gas mixture (crude helium) of at least 50 percent helium, with the remainder being essentially nitrogen. The nominal capacity for production of crude helium for the Sherman and Dumas plants was 360,000 Mcf per year and 428,000 Mcf per year, respectively. Production began at the Sherman plant in December, 1962, and at the Dumas plant in April, 1963.

7. Three private plants which in 1978 were producing Grade A helium from crude helium, are connected to the helium conservation system by way of private pipelines. These are the plants of Kansas Refined Helium Company, City Service Cryogenics and the Alamo Chemical and Gardener Cryogenics plants, all in Kansas. Of the three Bureau of Mines plants in the conservation system, only the Keyes plant in Oklahoma is still producing Grade A helium from a crude helium stock. The Excell plant and Amarillo plant in Texas are no longer producing Grade A helium for the Bureau of Mines, but are now used to control the pressure in the helium storage reservoir (Excell) and to liquify helium (Amarillo).

8. Other relatively small capacity private plants producing Grade A helium, which are not connected by pipeline to the conservation system, are Linde Division of Union Carbide in Kansas and the Navajo plant of Western Helium Corporation in New Mexico.

9. Helium storage exists in both the pipeline system and the storage system reservoir at Cliffside. Once crude helium enters into the pipeline system, it is considered in storage and unless dedicated to fulfilling the requirements

of the conservation contract is freely transferable from the Helex Company plant owners to the owners of the private Grade A helium producing plants.

10. A total of 33,760,506 Mcf of crude helium was acquired by the United States under the conservation program. Under the contracts, this helium was priced at $405,049,136.89, an average price of $12.03 per Mcf as shown in Table 2 below:

TABLE 2

HELIUM CONSERVATION CONTRACTS SUMMARY

Company	Amount $	Volume Mcf	Average Price $/Mcf
Northern Helex Co.	$ 51,864,201.12	4,475,921	$11.5874
Cities Service Helex, Inc.	84,719,570.87	6,720,927	12.6053
National Helium Corp.	154,775,285.89	12,217,628	12.6682
Phillips Petroleum Co.	113,690,079.01	10,256,030	11.0852
TOTAL	$405,049,136.89	33,670,506	$12.0298

11. Of these amounts, Phillips conveyed to the United States 10,256,030 Mcf of helium, priced under the contract at $113,690,079.01, an average of $11.0852 per Mcf.

12. At the time of termination in 1973, the government had approximately 35 billion cubic feet of helium in storage in the Cliffside Field in Texas, and it was estimated that about four billion cubic feet of helium was contained in the government-owned native gas in that field. It was also estimated that approximately 5.5 billion cubic feet of helium would be recovered in the Keyes plant under

its natural gas supply agreement. This assured the government a supply of 44.5 billion cubic feet of helium. As a result, the Secretary of the Interior found on February 2, 1973, that the objective of the Helium Act had been met. The objectives were to

> "foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits . . . a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities." 50 U.S.C. § 167m.

13. Approximately 42.8 billion cubic feet of helium is presently stored in Cliffside. Of this 42.8 billion, 32.2 billion was purchased under the helium conservation contracts; 1.5 billion was accepted in storage under court order; 3.5 billion was produced at Bureau of Mines plants; and 4.0 billion is contained in native gas. All of the approximately 34 billion cubic feet of helium acquired under the conservation program remains in storage at Cliffside. Assuming that the 34 billion cubic feet obtained from the conservation companies was worth $10 per Mcf, the government has an investment in the helium stored at Cliftside of $340 million. Assuming, again, that the invested money could draw 10 percent interest a year if properly invested, the United States is paying at least $34 million a year in interest to keep the helium in storage. The storage cost is about the largest cost item associated with the helium acquired under the conservation program.

Refined Helium Market

14. No relationship exists between Grade A helium prices and either the crude helium sold by Phillips to the United States or the crude helium sold to the United States

pursuant to any other conservation contracts. All such crude helium was placed in underground storage by the government and so remains. None has been refined into Grade A helium. It was not produced to supply current demands, but was produced to be saved and not wasted when the helium-bearing natural gas went to market. It is not known when the stored crude helium will be used; the purpose for which it will be used; nor the price at which it will be sold.

15. During the ten years involved in this case, approximately 92 billion cubic feet of helium was produced at the wellhead; 48 billion cubic feet of helium was not recovered, but instead was wasted into the atmosphere as the natural gas containing such helium was marketed. 44 billion cubic feet of helium was recovered in the United States, all of which was initially recovered as crude helium. Of this amount, 36 billion cubic feet was placed in underground storage by the government and remains there at this time. Of this 36 billion cubic feet in storage, 34 billion cubic feet represents all the crude helium sold by Phillips and the other conservation companies to the government. Of the 44 billion cubic feet of helium extracted and saved, only 8 billion cubic feet was refined into Grade A helium and only approximately 3.3 billion cubic feet was sold to private customers during the years in question. It is now clear that it would be improper to attempt to value the 34 billion cubic feet of conservation crude helium in storage by any price the 3.3 billion cubic feet of refined helium may have sold for. To do so would require the assumption that all of the 34 billion cubic feet of stored crude helium could have been refined and sold in the Grade A market. It is clear that such could not have been done without drastically reducing the price of Grade A helium.

16. The prices paid for Grade A helium during 1963 through 1972 are not sufficiently reliable as indications of value to serve as a starting point. It is uncontroverted that the government's 1961 price of $35.00 was adopted for the express purpose of creating sufficient income from government sales of refined helium to pay Phillips and the other conservation companies for the crude helium they were selling the government for storage, as well as to pay all other expenses associated with the storage program. Previous to that price, the government was selling Grade A helium to government users at $15.50 per Mcf and to private users at $19.00 per Mcf. The $35.00 price was never intended to represent a fair market value for helium. Nonetheless, the $35.00 price was the only price available during all of 1963, 1964, 1965 and a substantial portion of 1966. During those years there was only one other seller of Grade A helium (Kerr McGee), and one of Ashland's witnesses, then an employee of Kerr McGee affirmed that Kerr McGee purposely fixed its price to be equal to the posted government prices—whatever they might be—so that whatever the government price was, the Kerr McGee price was also. The helium the government sold during the ten years involved herein was produced by the government itself and was not purchased from the Helex companies.

17. After 1966 there was little stability of Grade A prices. Although Grade A helium producers began operations in 1966 through 1968 and the prices which they charged were significantly less than $35.00 per Mcf, there was no particular proximity of prices. One seller of Grade A helium in 1966 (Kansas Refined Helium) sold its product for an average price of $16.37 per Mcf and in 1967 for $17.68 per Mcf. At the same time other sellers in 1967 were selling the same product for $25.57 and $35.00 per Mcf.

A former Kerr McGee employee testified that he was personally familiar with an attempt to sell Grade A helium at $15.00 per Mcf in 1967. Weighted average Grade A helium prices charged by private parties f. o. b. the plant decreased from $25.39 per Mcf in 1966 to $20.21 in 1972, although Kerr McGee reduced its posted price to $19.00 in 1969 and maintained such until April 25, 1972.

18. During the 1962-1972 period the volume of Grade A refined helium sales varied substantially; sales of 611,000 Mcf in 1962 rose to 929,000 in 1969 and then steadily fell to $580,000 Mcf in 1972. As private companies began producing Grade A helium, the government's share of the commercial market continuously decreased from a high of about 135,600 Mcf in 1962 to a low of 6,279 Mcf in 1972.

Crude Helium Market

19. There is now, and was at all times since the commencement of the conservation contracts, a market for crude helium. This market consists of all crude helium sold to the government for storage purposes under the Helium Conservation Act, as well as all sales and purchases between private parties, all within a fairly narrow range of prices. Phillips' Exhibits 43, 44 and 45 describe the details of very substantial crude helium exchanges. Exhibit 43 reflects that the government purchased, between 1963 and 1972, approximately 31,400,000 Mcf of contained helium. Private parties exchanged more than 675,000 Mcf in just slightly more than six years beginning in late 1966 and ending in 1972, and approximately 686,000 Mcf in the three years thereafter. The crude helium market was by far the largest helium market in existence during the ten years herein. Numerous witnesses, including representatives of many of the purchasers and sellers of crude helium, testified that a well defined market for crude hel-

ium existed. The president of National Helium stated that a crude helium market existed and continues to exist, as did the vice president of Northern Helex. Similar expressions were received from representatives of Cities Service and Kansas Refined Helium, crude helium's largest private purchaser. Each testified extensively regarding the circumstances of each sale, the volumes sold, the prices received and the contract terms generally.

Phillips Contract Price

20. In the original trial of this case very little evidence was offered describing the negotiations which led to the contracts above-mentioned and, particularly, to the contract of November 13, 1961, between Phillips and the United States, and no relationship between the contract prices and any then existing markets or market values was developed of record. Credible written and oral evidence of these matters is now before the court.

21. As previously mentioned, the Phillips contract, which was the last of the four contracts to be negotiated with the Helex companies, resulted from intense negotiations between Mr. Henry Wheeler, the former Director of the Helium Conservation Program, representing the United States, and officials of Phillips Petroleum Company. Funds were available for only one more conservation contract with a crude helium producing company; and two companies, Phillips and Colorado Interstate, were both interested in acquiring a government contract. During negotiations with Phillips, Mr. Wheeler negotiated the price downward to $10.30 Mcf. Meanwhile, Colorado Interstate had offered to convey crude helium to the government at a price of $10.10 per Mcf. Despite the small price advantage offered by Colorado Interstate, Mr. Wheeler selected Phillips Petroleum because by doing so a greater volume of helium would be conserved.

22. Article 7.4 of the Phillips' contract provided that the United States would indemnify Phillips for any amount over approximately $3.00 per Mcf which Phillips might be required to pay third parties for acquisition of the commingled helium. Phillips had not requested that this indemnification be placed in the contract. Mr. Henry Wheeler testified that the clause was included so that the government would be treating all of the contractors alike. The testimony of Mr. Wheeler and Mr. Cullender, a member of the Phillips team that negotiated the contract, and the deposition of Mr. Wilson, the negotiator for National Helium, all established that Article 7.4 had no influence whatsoever on the price the United States paid for crude helium. The evidence reflects that Phillips believed it had title to the helium when it entered into the contract, that it did not request the indemnity provision, and in fact, did not consider its effect.[22]

Originally, Phillips had submitted a written proposal of $11.48 per Mcf wherein it offered to warrant its title. The government rejected such offer because it thought the price too high. The government countered with its own proposed contract, suggesting a figure of approximately $10.30 per Mcf. Such proposal contained no provision for title warranty by Phillips, but instead included the government indemnity clause discussed earlier. Neither side's actions evidenced a belief that the title question raised any issue of serious economic import.

23. The $10.30 price in the Phillips contract, adjusted only by the price index provision in paragraph 7.3, was

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22. In any event, more than one-half of the helium sold by Phillips to the government was not covered by Article 7.4 for it was produced from Phillips' own gas wells. Since paragraph 7.4 is irrelevant as to Phillips owned gas, the sale of helium produced by Phillips from its own wells represents a substantial comparable sale which clearly supports the use of Phillips' contract price as the starting value.

deemed by both Phillips and the government as the complete price and value of the crude helium. The indemnity provision was not deemed or intended by either as part of the purchase price. Similarly, the National Helium negotiator testified that in his opinion the contract price agreed between the government and National Helium was exactly representative of the crude helium's value at the time of the execution of the contract.

In addition, the United States' power of condemnation does not appear to have been a factor in the negotiation of the conservation contracts, since use of such power was neither threatened nor suggested. Phillips' concern was not that the United States would seek to condemn the helium, but, rather, that the United States would enter into a contract with some other party for the purchase of crude helium and thereby deny Phillips the opportunity to sell its helium to the United States.

24. As noted above, in 1966 several sales of substantial quantities of crude helium occurred between private parties, and sales continued to be made during all the years in question. In all instances the sellers sold the crude helium for prices comparable to those set forth in the conservation contracts and at least four substantial sales between 1967 and 1972 involved full title warranty by the seller. These sales with full title warranty strongly indicate that the conservation contract prices were not unduly low and were not forced downward by the presence of the indemnification clauses. The indemnification clauses caused no one to undervalue the helium.

Processing Costs

25. Effective application of the work-back method requires that the proper costs be deducted from the proper starting value. In this case the relevant costs are all

helium plant expenses allocable to helium production, plus an appropriate return on the amount of capital employed in such production.

26. Disputes between the parties on "cost" issues include disagreements as to the amount of plant expenses allocable to helium, the amount of capital allocable to helium, the rate of return to be allowed and whether in calculating this rate of return there should be included a sum sufficient to cover income taxes.

27. Phillips' accounting witness utilized essentially the same "capital employed" and plant expenses used by Ashland's accounting witness but made certain adjustments thereto. These adjustments to "capital employed" entailed:

(a) an increase in the amount of working capital based on Phillips' actual working capital;

(b) provision of a return on deferred testing (start-up) costs which were amortized over the life of the contract;

(c) inclusion of accounts receivable Phillips was required to finance and for which there was no provision for interest.

These changes reflect an accurate and appropriate approach in this case for computing "capital employed."

Ashland has never complained that Phillips was an inefficient helium extractor and in fact the evidence is quite to the contrary. Therefore, there is no justification for plaintiff's suggested approach of using Phillips' actual costs in some instances, while applying a formula for determining working capital when Phillips' actual

working capital appears to plaintiff to be larger than needed.

28. Determination of the return rate properly allowable to Phillips involves ascertainment of the return rate necessary at the time to induce Phillips' management to make the initial investment. Each of the experts testifying on the return issue for Phillips and the government was actually engaged during the period in question in the investment decision-making process of substantial corporations, and each testified that the minimum rate of return necessary to have caused a knowledgeable investor to make the investment made by Phillips was 15 percent after taxes. The testimony of Phillips' employees fully supports this conclusion.

The court finds that the prospect of a 15 percent after-tax return was required to induce Phillips or any other knowledgeable investor to enter into the contract involved here. Phil ps' helium plant costs should, therefore, include such a return.

29. To effect the appropriate after-tax return, monies paid in income taxes should be included as a cost item. Failure to include income taxes would, under the work-back method of valuation, place too high a value on the helium at the wellhead.

30. The issue of expenses properly allocable to hydrocarbon production results from the fact that helium plant operations concentrate liquefiable hydrocarbons contained in the natural gas processed at the helium plants. These concentrated liquefiable hydrocarbons leave the helium plant in what is termed the "rich gas stream," which then enters a gasoline plant where further processing and extraction of liquefiable hydrocarbons occurs. The effi-

ciency of the gasoline plant is improved by the helium plant's concentration of the liquefiable hydrocarbons.[23]

31. The court finds that allocation of helium plant expenses to the production of hydrocarbons should be based on the "functional cost benefit method" proposed by Phillips. Helium plant investment and expenses should be allocated between crude helium production and production of the rich gas stream. Phillips' method of allocation results in an allocation of helium plant costs on an equitable basis and in a logical manner. The incremental liquids credit proposed by Ashland is subject to various compelling criticisms, both as to the basis for its calculations and its potentially inequitable results.

Fair Market Value

32. In 1977, of the total 6.92 billion cubic feet of commingled helium produced, a mere 1.38 billion cubic feet was recovered. This small recovery results from he-

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23. Ashland contends that the net value of the additional liquids (called incremental liquids by Ashland) should be used under the by-product cost accounting method to reduce the cost of helium extraction. On its exhibits Ashland adds the net value of these incremental liquids to the wellhead value of the helium but the effect is the same as subtracting these net liquid values from the cost of helium extraction before determining the wellhead value of the helium. Phillips contends that Ashland has not properly calculated the volume of what it calls incremental liquids in that the base period selected by Ashland does not actually reflect what the liquid recovery would have been in succeeding years had the helium plants not been built and that Ashland has been arbitrary in its determination of the incremental liquids inasmuch as it has failed to take into account the fact that processing the natural gas through the helium plants actually caused a reduction in the recovery of the most valuable of these liquid products. Phillips contends that Ashland has already received the benefit of Phillips' cost savings and that no allocation of expenses to hydrocarbon production is necessary. Furthermore, Phillips contends that if an allocation of helium plant expenses to the production of hydrocarbons must be made, then the allocation should be made on the basis of a functional benefit cost study.

lium's market demand being tremendously overmatched by available supplies. For example, even though cheap storage of helium is available at Cliffside, Cities Service Helex, one of the companies with the existing capacity to recovery helium, is simply venting it to the atmosphere despite being connected to the conservation system. Neither the National Helium plant at Liberal nor the Phillips-Dumas plant are producing crude helium for storage.

33. In excess of 188 billion cubic feet of contained helium in proved or probable reserves of helium-rich gas (containing 0.3 percent helium or more) had been identified as of 1977. Of that 188 billion cubic feet, 105 billion cubic feet is in non-depleting reserves, i. e., it is either in storage at Cliffside or is contained in natural gas of a low heating value which is not being produced.

34. A $2.00 per Mcf price for commingled helium was used by the Bureau of Mines in computing the price it was willing to pay under the helium conservation program. The four Helex companies in good faith believed that they owned the helium contained in the natural gas and accepted $2.00 per Mcf as the value of the commingled helium.

35. Dr. Leo Garwin, witness for Ashland, authored an article published in the April, 1969, issue of "Hydrocarbon Processing," wherein he stated that the helium content in natural gas "is normally worth between $2.00 and $3.00 per Mcf. Similarly, in a letter dated September 12, 1969, to the Chairman of the House Committee on Interior and Insular Affairs, Dr. Garwin referred to the value of helium contained in natural gas as $2.00 to $3.00 per Mcf; and in 1967 Dr. Garwin testified on behalf of Ashland at an arbitration proceeding that the value of

helium contained in natural gas owned by Ashland was $2.35 per Mcf.[24]

CONCLUSIONS OF LAW

1. This court's responsibilities and duties on remand are set forth in the appellate opinion in this case rendered subsequent to the first trial. *Ashland v. Phillips*, 554 F.2d 381 (10th Cir. 1975).

2. Ashland's suit for the reasonable value of the helium in controversy here is, in effect, an action in quantum meruit. *See Phillips Petroleum Co. v. Texaco, Inc.* 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974).

3. The court of Civil Appeals for the State of Texas, the state where this action was commenced, has observed:

> "quantum meruit, [is] a creature of equity, . . ." *University State Bank v. Gifford-Mill Const. Corp.*, 431 S.W.2d 561 (Tex.Civ.App.1968).

That court has further held that quantum meruit actions "rest their holdings upon equity and justice" and that recoveries thereunder require "equity and justice." *Ochiltree County v. Hedrick*, 366 S.W.2d 866 (Tex.Civ.App.1963).

4. Strict adherence to exact mathematical formulations which fail to encompass the equities in this case is inappropriate. The Court must seek equity and justice for all parties.

5. For example, the wellhead values for helium extracted at the two plants for the years 1963-1971 vary from a minus $.40 per Mcf to $5.34 per Mcf of helium. Additionally, the values of helium vary from plant to plant for exactly the same year; the value of the helium extracted from the Sherman plant in 1968 was $4.34 and the value of helium extracted from the Dumas plant for

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24. Tr. 838-848; United States Exhibit Nos. 36, 37; Dr. Garwin, supra.

the same year is $.41 per Mcf. The court believes this clearly illustrates that rigid application of mathematical calculations under the work-back method would render fractured and inequitable results.

6. Equitable considerations indicate that a single uniform value for commingled helium should be applied to all of the helium extracted at both the Sherman and Dumas plants for each year.

7. The reasonable value of the helium commingled at the wellhead should be the sum that would have resulted from fair negotiations between an owner willing to sell and a purchaser desiring to buy. *Standard Oil Company v. Southern Pacific Company,* 268 U.S. 146 at 155, 45 S.Ct. 465, 69 L.Ed. 890 (1925).

8. Based upon all of the oral and documentary evidence presented by the parties during this trial and the first trial, the court concludes that the reasonable value of the commingled helium is $3.00 per Mcf of contained helium for each and every year that helium was produced, regardless of the plant from which it was produced.

9. Plaintiff Ashland is entitled to judgment against defendant Phillips as to the 72,748 Mcf of contained helium at issue in this case, in the amount of $218,244.00.

10. Generally, interest is awarded only where the amount involved is liquidated. *Palmer v. Radio Corporation of America,* 453 F.2d 1133 at 1140 (5th Cir. 1971). Previous to judgment herein, the amount owed Ashland has remained unliquidated. Phillips asserted a good faith and persuasive title claim to the commingled helium previous to the opinion in *Northern Natural Gas Company v. Grounds, supra.* Subsequently, the helium's value has remained very much in dispute.

Ashland is entitled to interest as of the judgment date herein, as provided by law.

An appropriate judgment will be entered herein.

APPENDIX S

Opinion of the United States Court of Appeals for the Tenth Circuit, Dated May 10, 1977 (554 F.2d 381)

ASHLAND OIL, INC., Appellee,
Cross-Appellant,

v.

PHILLIPS PETROLEUM COMPANY,
Appellant,

v.

UNITED STATES of America,
Intervenor-Appellant.

Nos. 73-1797, 73-1798 and 73-1799.

United States Court of Appeals,

Tenth Circuit.

Jan. 27, 1975.

On Rehearing En Banc May 10, 1977.

Natural gas seller brought action to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government. The United States District Court for the Northern District of Oklahoma, Luther L. Bohanon, Senior District Judge, 364 F.Supp. 6, entered judgment against defendant and against government as intervenor. The defendant and government appealed, and

plaintiff also appealed as to ultimate division of proceeds derived from the helium. The Court of Appeals, Seth, Circuit Judge, held that: (1) despite expert opinion testimony as to what the value of the helium should be, where the comparable sales, current market price method could not be used because comparability of "other sales" was not clearly established, trial court properly had resort to a work-back method, or price less cost of beneficiation; (2) further consideration was required with respect to some of the elements used in determining value under the work-back method; (3) trial court's application of federal law was proper; (4) proceeds should be divided between lessors and lessees in accordance with terms of leases and other agreements rather than being divided equally; (5) there was no abuse of discretion in allowance of prejudgment interest; and (6) case was not appropriate for award of attorney's fees.

Affirmed in part, reversed in part and remanded.

Doyle, Circuit Judge, filed a dissenting opinion.

1. Gas (Key) 14.6

In action to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government, evidence failed to establish a "market price" by comparable sales where the transactions described by the witnesses, including purchases of helium during World War II and contracts made for payment for components of gas production purchased in instances where it was not shown that the gas had a helium content or that there was ever a remote possibility of extraction, were too remote in time or place and otherwise could not be considered as comparable.

2. Gas (Key) 14.4(4)

In action to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government under Helium Act, despite expert opinion testimony as to what the value of helium should be, where the comparable sales, current market price method could not be used because comparability of "other sales" was not clearly established, trial court properly had resort to a work-back method, or price less cost of beneficiation. Helium Act, § 2 et seq., 50 U.S.C.A. § 167 et seq.

3. Gas (Key) 14.4(1)

In action to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government, in determining value under the work-back method, figure of $2 per Mcf for treatment of crude helium was approved, but the further consideration was required with respect to proper starting value, amount chargeable to return on investment, expense properly allocable to production of hydrocarbons, and other matters.

4. Gas (Key) 14.4(1)

In action by natural gas seller to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government under the Helium Act, requiring the Government to pay for the value of the helium was not inappropriate on the theory that the helium values were created by its own purchase program; helium had value by reason of its nature and usefulness, and though the Government may have made the helium available, it did not create its value. Helium Act, § 2 et seq., 50 U.S.C.A. § 167 et seq.

5. Gas (Key) 14.1(3)

Where the government agreed basically to pay natural gas purchaser for its interest in helium contained in the gas and then to pay more if other interest owners established their claims, the value sought to be established was independent of the contract base amount, and there was no reason that the trial court could not determine that value of the helium at the wellhead exceeded the base figure for the helium-nitrogen mixture that the government was buying from gas purchaser under its contract.

6. Federal Courts (Key) 413

Even though action by seller of natural gas to recover reasonable value of helium extracted by natural gas purchaser and sold to federal government was started as a diversity suit, application of federal law was proper, where federal government was liable for additional amount which defendant would have to pay by reason of the action, where federal government was ultimately faced with claims made by a multitude of interest owners from many states relating to production from Kansas, Oklahoma, and Texas, where helium was acquired by federal government by contracts authorized by federal statutes, and where federal government entered case as a plaintiff to assert its own position and interest. 28 U.S.C.A. § 1345; Helium Act, § 2 et seq., 50 U.S.C.A. § 167 et seq.

7. Federal Courts (Key) 413

When United States seeks to litigate or seek a remedy arising from transactions it has entered into the ordinary commercial world to carry out its program, federal law may be applied, and federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary, and may apply state doctrines

or parts of them as "federal law," but the impact of the application of state law on the governmental interests is a factor of great weight.

8. Gas (Key) 14.6

In action by natural gas seller to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government, purchaser was not entitled to setoff for any sums previously paid to seller for purchases of jurisdictional gas.

9. Mines and Minerals (Key) 73.1(7)

Proceeds attributable to value of helium extracted by natural gas purchaser from natural gas stream and sold to federal government should not have been divided equally between lessors and lessees, but rather should have been divided in accordance with terms of leases, and terms of other agreements relating to shares of production, or payment for shares of production if such be applicable.

10. Limitation of Actions (Key) 105(1)

In action by natural gas seller to recover reasonable value of helium extracted by natural gas purchaser and sold to the federal government, involving protracted litigation on related cases, equitable considerations applicable to periods of limitation came into play, and action was not barred by limitations.

11. Interest (Key) 39(2)

Allowance of prejudgment interest, in action by seller of natural gas to recover reasonable value of helium extracted by natural gas purchaser and sold to United States, did not constitute an abuse of discretion.

12. Federal Civil Procedure (Key) 2737.5

Action by seller of natural gas to recover reasonable value of helium extracted by natural gas purchaser and sold to federal government was not an appropriate case for award of attorney's fees.

Richard B. McDermott, Tulsa, Okl. (Lloyd G. Minter and Don L. Jemison, Bartlesville, Okl., with him on the brief), for appellant.

Gerald Sawatzky, Wichita, Kansas (Jay W. Elston, Houston, Texas, John M. Imel, Tulsa, Oklahoma, Arloe W. Mayne, Ashland, Kentucky, W. O. Strong III, Houston, Texas, and Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, Fulbright & Jaworski, Houston, Texas, and Martin, Logan, Moyers, Martin & Conway, Tulsa, Oklahoma, of Counsel, with him on the Brief), for Appellee, Ashland Oil, Inc.

Floyd L. France, Atty., Department of Justice, Washington, D.C. (Peter R. Taft, Asst. Atty. Gen., Washington, D.C., Nathan G. Graham, U.S. Atty., Hubert A. Marlow, Asst. U.S. Atty., Tulsa, Okl., E. Edward Johnson, U.S. Atty., Topeka, Kan., Jon K. Sargent, Asst. U.S. Atty., Edmund B. Clark, Dennis A. Dutterer, George R. Hyde, and Jacques B. Gelin, Attys., Department of Justice, Washington, D.C., with him on the Brief), for Intervenor-Appellant, United States of America.

Before LEWIS, Chief Judge, BREITENSTEIN, SETH, McWILLIAMS, BARRETT and DOYLE, Circuit Judges, sitting en banc.

SETH, Circuit Judge.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted

therefrom, and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court, and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in the several opinions hereinafter cited. It is, however, necessary to describe the contractual relationship which existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. § 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability

of the Bureau to then ascertain the identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

We are here concerned with the Government contract with defendant Phillips whereby the helium was physically acquired by the Government, but the ownership and compensation problems were put off to another day. The Bureau thus used by this contract the advantageous position of one in possession; postponed the inevitable legal problems, and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as compensation to defendant. The record shows that this figure was arrived at by comparison of the estimated cost to the Government had it built its own plant. No relationship of this figure to any then market values was developed in the record. This was a base price of $10.30 per Mcf and was subject to escalation under Paragraph 7.3. Paragraph 7.4 provided that in addition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein." It

provided that such payments to qualify would have to be made with the consent of the buyer, and that "consent" included claims that ". . . have been judicially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the contract formula the defendant would pay the first $3.00 per Mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States, with the United States providing an indemnification for required payments above the stated amount. There are other qualifications also.

It is obvious that this litigation wherein compensation is demanded by the interest owners of the helium was contemplated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part decided in the *Consolidated Helium Cases* (*Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir.)), opinion by Judge Breitenstein. The basic legal relationships among the landowners, producers, and gas purchasers were there established, as was the relationship of the Natural Gas Act and the Helium Act. The controlling rules were set in the *Grounds* opinion, en banc consideration was denied, and the Supreme Court denied certiorari, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267. We decline to reconsider *Grounds*. Further, in *Grounds* we held that ". . . the lessee-producers are entitled to the reasonable value of the contained helium." The problem of the amount of reasonable compensation,

and who should pay, was not decided in *Grounds*, and was remanded to the trial court. The *Grounds* case is again before this court en banc and was consolidated for hearing with this case, but is not considered in this opinion.

When the matter of compensation is in issue we are faced with a somewhat different aspect of the physical and legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract arrangement are all still important, but the relationship of the contracting parties to those who now have been determined to own interests in the helium, and of course, the value of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United States" attached. This motion was granted. The complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, cited 28 U.S.C.A. § 2201, and recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium in turn sold to the United States under the contract referred to above. The Government further alleges that Ashland has already been paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal."

The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnity Phillips for additional payments . . ." The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint. Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be changed to Ashland Oil and Refining Company, Plaintiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, objected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought by Ashland against the defendant Phillips to recover the reasonable *wellhead value of helium commingled with the FPC jurisdictional Gas*, but separated at defendant's plants constructed pursuant to the Helium Act and delivered as "conservation helium" to the Bureau of Mines. The suit was tried within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases*, or *Grounds*).

diminution in helium requirements or any circumstance of similar nature should occur which would make the continued operation of Seller's plant and the continued purchase of helium-gas mixture extracted therein unnecessary to accomplish the purposes of the Act or any amendment thereto, or (2) a material circumstance of force majeure making it impracticable or impossible for either Buyer or Seller to carry out its obligations under this contract which circumstance cannot be remedied with reasonable dispatch.

12.2 Seller may, at its option, terminate this contract at any time for any reason beyond the control of Seller, which at the time of the occurrence of such reason for termination could not have been avoided by Seller's exercising reasonable skill, planning and management, and which would make the continued operation of Seller's plant and the continued sale of helium or helium-gas mixture extracted therein wholly impracticable or impossible, and such reasons may include, but not be limited to, the following: (1) a substantial natural diminution, beyond present scientific expectancy, in the helium content of the natural gas contemplated for processing hereunder, (2) a court of competent jurisdiction enters a final order, decree, or judgment sustaining the validity of a claim, adverse to a predecessor to Seller's interest or adverse to Seller itself, to any title or to any interest in the helium in the gas stream as contemplated herein to be made available for processing in the plant, but only if Seller should be unable to obtain such title or any interest in such helium with the consent of Buyer to make certain payments as provided in paragraph 7.5, (3) inability of Seller, any affiliated company, or any supplier or suppliers of the natural gas to secure any Federal Power Commission Certificates of Public Convenience and Necessity and any other governmental permits or authorizations, satisfactory to the recipients thereof, that are required by Seller or any affiliated company to enable Seller to fulfill its obligations hereunder, (4) Seller is prevented or impeded by any

judicial decree or other governmental rule or order from obtaining or processing the natural gas contemplated for processing in the plant, (5) Buyer becomes six (6) months or more in arrears in payments under paragraph 9.2, (6) Seller is subjected to regulation or control by any governmental agency, and as a consequence thereof, Seller is required to sell helium or helium-gas mixture to Buyer at a price lower than the unit price that would otherwise be payable hereunder or, as a result of the Renegotiation Act (Title 50 App. 1191) or any similar legislation or regulation, Seller is required to return to the Buyer any part of the revenues received by Seller pursuant to the terms of this contract, or (7) a material circumstance of force majeure making it impracticable or impossible for either Buyer or Seller to carry out its obligations under this contract which cannot be remedied with reasonable dispatch.

12.3 Termination as provided in this Article XII shall be accomplished by written notice by registered mail from the party so terminating to the other party stating the reasons therefor; and such termination shall be effective in the time and manner specified in said notice, but no sooner than sixty (60) days after the mailing of said notice. Such termination shall not limit or affect Seller's right to any payments hereunder for helium-gas mixture tendered for delivery hereunder prior to such termination, and such termination shall be subject to any accrued and unsatisfied obligations or liabilities of either party under this contract.

12.4 Upon notice of termination of this contract as provided in this Article XII, Seller shall, unless both parties agree otherwise, immediately thereafter discontinue the work and placing of orders for materials, equipment, and supplies in connection with the performance of this contract, and shall make every reasonable effort to effect cancellation of all existing orders and contracts upon terms satisfactory to both parties, and shall thereafter do only such work as may be necessary to

preserve and protect work already in progress and to protect materials, equipment, and supplies at the site of the plant or in transit thereto.

ARTICLE XIII.

Contingencies.

13.1 In the event that this contract is terminated by Buyer pursuant to paragraph 12.1 of this contract, or by Seller pursuant to paragraph 12.2, Seller shall within six (6) months after the mailing of a written notice of such termination, at its sole option, elect one of the following two courses of action, and advise Buyer in writing accordingly:

(a) Seller shall sell and transfer title to the plant (not including the right to extract helium from the natural gas, as defined herein, or any other gas), and Buyer shall pay to Seller for the plant a sum of money comprised of (i) an amount of money equal to the original cost thereof, as shown on Seller's books, multiplied by a factor, the numerator of which is the Bureau of Labor Statistics wholesale price index for all commodities except farm and foods (based on 1947-1949 prices) for the month in which the notice of termination is given and the denominator of which is such index for the month of the execution of this contract, the resulting product being reduced by straight-line depreciation calculated to the date of termination at the rate of five (5) percent per annum insofar as normally depreciable items are concerned, and (ii) an amount of money to reimburse Seller for all other costs incurred in connection with this contract and which may not otherwise be recovered because of the termination of this contract including, but not limited to, the following:

(1) Seller's book cost of all materials, supplies, and other items of personal property that are transferred to Buyer as a consequence of termination and which are not included in the original cost of the plant.

(2) All costs incident to termination of services of employees of Seller engaged in work required in the performance of this contract.

(3) All costs incurred by Seller for prepaid items.

(4) All penalties or premiums paid by Seller resulting from liquidation of any debts.

(5) All of Seller's costs incident to termination of orders or contracts which may be in part unperformed.

(b) Seller shall retain ownership and title to the plant, and Buyer shall pay to Seller the amount of money that is required to reimburse Seller to the extent that the then fair market value of the plant is less than the original cost of the plant as shown on Seller's books, less depreciation on depreciable portions of the plant calculated to the date of termination on a straight-line basis at five (5) percent a year. No payment by Buyer shall be made to Seller under this subparagraph, if selected, if the then fair market value of the plant exceeds the then depreciated original cost of the plant. Seller shall not be required to make any payment to Buyer under this subparagraph (b) under any circumstances.

For the purposes of this paragraph 13.1, the term "original cost" shall include but not be limited to the following items in connection with this contract: (1) the cost to Seller of the plant as originally constructed and the cost to Seller of any replacements or additions thereto that may be necessary to enable Seller to carry out its obligations hereunder; (2) all planning, designing, engineering, and start-up costs and expenses, (3) all costs and expenses incident to the negotiations and closing of this contract, including the expense of any performance bond or other bond required in connection with the performance of this contract; (4) all expenses and costs incurred by Seller, Panhandle Eastern Pipe Line Company, and National Distillers and Chemical Corporation, or any affiliate of either in connection with any negotiations, planning, engineering, designing, financing, or other action implementing this contract and its performance whether occurring before or after the actual date of execution of this contract which Seller has

paid or is obligated to pay; (5) an amount equal to the interest paid by Seller for the period prior to the date of initial delivery of helium-gas mixture hereunder on money borrowed by Seller during said period; (6) an amount equal to six and one-half (6½) percent per annum on the average monthly amount of money invested as equity capital in Seller for the period prior to the date of initial delivery of helium-gas mixture hereunder; (7) all financing costs of Seller; and (8) all taxes, other than income taxes, payable by Seller for the period prior to the date of initial delivery of helium-gas mixture hereunder.

If Seller fails to make an election within the time and in the manner provided herein, Seller shall be deemed to have elected to sell and transfer title to the plant to Buyer.

13.2 (a) If the circumstances relied upon by Seller for termination under paragraph 12.2 result from a hazard or risk which is now insurable under the law of the State of Kansas pursuant to standard insurance policies commonly known as fire and extended coverage insurance policies, use and occupancy policies, or boiler and machinery policies, the obligation of the Buyer under paragraph 13.1 shall be reduced by elimination from the computation of payments to be made thereunder the amounts allocable to the loss or damage of property insurable against such hazards or risk.

(b) Buyer shall not be under any obligation under paragraph 13.1 if Seller terminates this contract pursuant to item (1) of paragraph 12.2, except that in such event Buyer shall have the option exercisable in sixty (60) days from Seller's notice of termination for such reason, to elect to purchase the plant and if Buyer so elects, then the provisions of paragraph 13.1(a) shall apply.

13.3 Irrespective of any right in Seller hereunder to retain ownership of the plant, in the event of termination of this contract, Buyer shall have the option within sixty (60) days after notice of termination to elect to acquire the plant and

make payment therefor to Seller in accordance with the provisions of paragraph 13.1(a).

13.4 In the event that Buyer shall acquire Seller's plant, and if Buyer shall then determine that the plant shall operate in place, Buyer and Seller shall negotiate in good faith a contract for whatever helium-bearing natural gas, helium-gas mixture, helium, fuel gas, and any other rights that Seller might own and that are required by Buyer in the operation of said plant. If Buyer shall desire further that the plant be operated in place by a private company, Buyer agrees that Seller shall have a preferential right to make an operating contract with the Buyer upon terms and conditions as favorable as those terms and conditions that Buyer might otherwise obtain in negotiations with a third party.

13.5 (a) In the event that Buyer shall acquire Seller's plant and thereafter Buyer or a third party operates the same, then Seller shall have the right to continue to operate related facilities for the extraction of any product other than helium-gas mixture, and Buyer or said third party shall continue to operate the plant in a manner consistent with the operation as an integrated unit of the plant and Seller's related facilities. In this event, Buyer and Seller shall negotiate in good faith an agreement governing the manner of continued operation of such facilities of Seller. If Buyer employs any third party to operate the plant, or if Buyer sells the plant to any third party, the rights of such third party shall be made subject to such agreement.

(b) In the event that Buyer shall acquire Seller's plant under any of the foregoing paragraphs and shall not operate the same, Seller shall have the right to continue to operate for its own account Seller's related facilities for the extraction of any products other than helium-gas mixture, and Seller shall have the option to lease or buy from Buyer upon reasonable and usual terms, such portion of the plant, as in Seller's opinion is

necessary for Seller to operate efficiently and economically, such related facilities; and all other portions of the plant acquired by Buyer may be removed by Buyer at its discretion.

13.6 In the event that this contract is terminated under the provisions of Article XII within twelve (12) years after the effective date of this contract, and if any payment to be made by Buyer in accordance with this Article XIII is not made within ninety (90) days after the date of receipt by Buyer of Seller's bill thereof, Buyer shall pay interest thereon from the date of receipt by Buyer of said bill to the date on which such payment is made, at a rate of interest equal to the New York bank prime rate of interest in effect on the ninetieth day after the date of receipt by Buyer of said bill, but if such payment is made within the aforesaid ninety (90) day period then no interest shall be due or payable thereon.

13.7 Nothing herein shall preclude either party from being entitled to any interest prescribed by law or judicial decree.

ARTICLE XIV.

Rights-of-Way.

14.1 Each party shall grant to the other, so far as it has the right to do so, and so long as this contract is effective, and to the extent possible without causing interference with its own operations, rights-of-way on land owned or controlled by it for the other party's pipelines and other equipment as may be necessary or desirable in fulfilling such party's obligations under this contract, with full right of ingress and egress to and from the premises, and further right to do thereon acts necessary or convenient for the carrying out of the terms and provisions of this contract. All equipment placed by one party upon the land of the other shall be and remain the property of the party placing same and be subject to removal by it at any time.

ARTICLE XV.

Liability.

15.1 Neither the Buyer nor Seller shall be held to be responsible or liable for damage for the acts or conduct of the other.

ARTICLE XVI.

Force Majeure.

16.1 In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligation under this contract, other than to make payments of amounts due hereunder, it is agreed that on such party's giving notice in writing or by telegraph to the other party, stating the full particulars of such force majeure as soon as possible after the occurrence of the cause stated in said notice, the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such inability to perform shall, so far as possible, be remedied with all reasonable dispatch; provided, however, that Buyer shall not by reason of this Article XVI be relieved for more than five (5) days during any fiscal year of its obligation to take or pay for helium-gas mixture under the provisions of Article II.

16.2 The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint of rulers and peoples, civil disturbances, explosions, breakage or accident to machinery, equipment, or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of gas wells, inability to obtain materials, supplies, or permits, and any laws, orders, rules, regulations, acts, or restraints of any government or governmental body of author-

ity whether civil or military, and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to avoid. Settlement of strikes and lockouts shall be wholly within the discretion of the party having the difficulty.

ARTICLE XVII.

Waiver of Default.

17.1 No waiver by either party for any one or more defaults by the other in the performance of any provisions of this contract shall operate or be construed as a waiver of any future default or defaults, whether of a like or of a different character.

ARTICLE XVIII.

Assignment of Contract.

18.1 This contract and all the terms, conditions, and the covenants hereof, shall be binding upon and inure to the benefit of the parties hereto, their successors, and assigns.

18.2 Seller may assign any or all of its rights hereunder to an affiliated company or to any person, firm, or corporation acquiring substantially all of the assets of Seller, and Buyer may assign any or all of its rights hereunder to another department of the United States, but otherwise no assignment of this contract shall be made by either party without the written consent of the other party; provided, however, such consent shall not be unreasonably withheld.

18.3 Seller may mortgage, pledge, and hypothecate this contract to any financial institution or lender as security for bonds or other obligations or securities of Seller, provided no such mortgage, pledge, or hypothecation shall relieve Seller of its obligations under this contract.

ARTICLE XIX.

Assignment of Claims.

19.1 Claims for monies due or to become due Seller from Buyer under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution by or to any similar institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this agreement, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in the Assignment of Claims Act of 1940 (31 U.S.C. 203, 41 U.S.C. 15) be subject to reduction or setoff.

ARTICLE XX.

Patents.

20.1 Seller shall hold and save Buyer, its officers, agents, servants, and employees, harmless from liability of any nature or kind including costs and expenses, for or on account of any patented or unpatented invention, article, process, appliance, or apparatus used by Seller in performance of this contract.

ARTICLE XXI.

Nondiscrimination.

21.1 In connection with the performance of work under this contract, Seller agrees as follows:

(1) Seller will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. Seller will take affirmative action to ensure that

applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Seller agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(2) Seller will, in all solicitations or advertisements for employees placed by or on behalf of Seller, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) Seller will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Contracting Officer, advising the said labor union or workers' representative of Seller's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) Seller will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(5) Seller will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to its books, records, and accounts by the Contracting Officer and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of Seller's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled in whole or in part and Seller may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) Seller will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to Section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. Seller will take such action with respect to any subcontract or purchase order as the Contracting Officer may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event Seller becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Contracting Officer, Seller may request the United States to enter into such litigation to protect the interests of the United States.

ARTICLE XXII.

Convenant Against Contingent Fees.

22.1 Seller warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by Seller for the purpose of securing business. For breach or violation of this warranty, Buyer shall have the right to annul

this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE XXIII.

Officials Not to Benefit.

23.1 No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XXIV.

Examination of Records.

24.1 Seller agrees the Contracting Officer and the Comptroller General of the United States or any of their duly authorized representatives shall, until the expiration of three (3) years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of Seller involving transactions related to this contract.

24.2 Seller further agrees to include in all of its subcontracts hereunder a provision to the effect that the subcontractor agrees that the Contracting Officer and the Comptroller General of the United States or any of their duly authorized representatives shall, until the expiration of three (3) years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding twenty-five hundred dollars ($2,500), and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

ARTICLE XXV.

Performance During Disputes.

25.1 In the event of any dispute under this contract, the parties hereto shall, notwithstanding the pendency of such dispute, diligently proceed with the performance of this contract without prejudice to the rights of either party.

ARTICLE XXVI.

Buy American Act.

26.1 In acquiring end products, the Buy American Act (41 U.S.C. 10 a-d) provides that the Government give preference to domestic source end products. For the purpose of this article:

(i) "Components" means those articles, materials, and supplies which are directly incorporated in the end products;

(ii) "End products" means those articles, materials, and supplies which are to be acquired under this contract for public use; and

(iii) A "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States exceeds fifty (50) percent of the cost of all its components. For the purposes of this paragraph 26.1 (iii) (B), components of foreign origin of the same type or kind as the products referred to in paragraph 26.2 (ii) or (iii) shall be treated as components mined, produced, or manufactured in the United States.

26.2 Seller agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) Which are for use outside the United States;

(ii) Which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) As to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) As to which the Secretary determines the cost to the Government to be unreasonable

ARTICLE XXVII.

Convict Labor.

27.1 In connection with the performance of work under this contract, Seller agrees not to employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE XXVIII.

Eight-Hour Law of 1912—Overtime Compensation.

28.1 This contract to the extent that it is of a character specified in the Eight-Hour Law of 1912, as amended (40 U.S.C. 324-326), and is not covered by the Walsh-Healey Public Contracts Act (41 U.S.C. 35-45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912, as amended, and to all other provisions and exceptions of said Law:

> No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Seller or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Seller or any subcontractor

engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause, and all penalties thus imposed shall be withheld for the use and benefit of the Government.

ARTICLE XXIX.

Walsh-Healey Public Contracts Act.

29.1 If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed ten thousand dollars ($10,000) and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

ARTICLE XXX.

Utilization of Small Business Concerns.

30.1 It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

30.2 Seller agrees to accomplish the maximum amount of subcontracting to small business concerns that Seller finds to be consistent with the efficient performance of this contract.

ARTICLE XXXI.

General.

31.1 All headings appearing in this contract are for convenience only, and shall not be considered a part of this contract for any purpose, or as in any way interpreting, construing, varying, altering, or modifying this contract or any of the terms and provisions thereof.

31.2 The terms of this contract express and constitute the full agreement between the parties thereto. There are no warranties, covenants, stipulations, or conditions existing apart from the terms of this contract.

31.3 Buyer warrants that it has not and will not enter into contracts that would cause Buyer to exceed the fiscal limitations of the Act.

31.4 To the extent not governed by any Federal law, regulation, or executive order, this contract shall be construed in accordance with the laws of the State of Kansas.

31.5 If this contract is not approved and executed on behalf of Buyer on or before October 11, 1961, Seller may, by written notice to Buyer after October 11, 1961, and prior to such approval and execution on behalf of Buyer, withdraw its approval and execution hereof.

31.6 If for any reason and at any time it should become impossible or impracticable to determine the adjustments set forth in Articles VII and XIII based upon the Bureau of Labor Statistics Wholesale Price Index, the parties hereto agree that they will mutually determine an appropriate method of accomplishing the adjustments in accordance with the intent of this contract.

ARTICLE XXXII.

Notices.

32.1 All notices to be given hereunder shall be written and delivered or sent to the parties at the following addresses:

Buyer—General Manager, Helium Operations
Bureau of Mines
514 Barfield Building
Amarillo, Texas

Seller—National Helium Corporation
Liberal, Kansas

IN WITNESS WHEREOF, the parties hereto have caused this contract to be duly executed in duplicate by their proper officers the day and the year first above written, intending to be legally bound thereby

United States of America
By Marling J. Ankeny
Title Director
Bureau of Mines

Approved
By John M. Kelly
Acting Secretary of the Interior

National Helium Corporation
By F. J. McElhatton
President

Attest:
R. D. Hunsucker
Assistant Secretary
Corporate Seal

APPENDIX NN

Contract Between United States of America and Northern Natural Gas Company

EXCERPTS FROM CONTRACT FOR THE SALE AND PURCHASE OF A HELIUM-GAS MIXTURE

between

THE UNITED STATES OF AMERICA

and

HELEX COMPANY

(Dated August 15, 1961)

ARTICLE VIII. OWNERSHIP AND TITLE

8.1 The helium-gas mixture sold and delivered by the Seller to the United States hereunder, including all of the constituents thereof, shall become the property of the United States at the point of delivery specified in Article VI hereof.

8.2 Seller warrants title to the helium-gas mixture delivered hereunder and the right to sell the same and that it is free and clear of all liens and adverse claims. Both of the parties hereto agree that such warranty is subject to the obligation of the United States to make certain payments to Seller in accordance with paragraph 7.4. Seller agrees further that, upon request by the United States, Seller shall provide such documentary evidence as it has in its possession covering Seller's rights, titles and interests in and to the helium-gas mixture delivered hereunder.

8.3 In the event of any adverse judicial decisions arising out of any claims to the title of the helium-gas mixture or any constituents thereof, the United States may, without otherwise affecting this contract, retain up to twenty-

eight (28) per cent of part 2 of the unit price of such part of the helium-gas mixture affected by such adverse decision, without interest, until such claims are finally resolved or until satisfactory indemnity or bond has been furnished by Seller to the United States.

ARTICLE IX. BILLING AND PAYMENT

9.1 Seller shall on or before the tenth day of each calendar month render to the United States a billing statement showing for the preceding calendar month the volume of helium-gas mixture tendered for delivery hereunder, the percentage of helium in such helium-gas mixture, the calculated volume of contained helium therein, and the total sum of money due and payable to Seller therefor. Seller shall also include with this monthly statement, or otherwise make available to the United States, any charts, records, or measurements reasonably required by the United States in verifying the quantities of helium-gas mixture and contained helium and the amount of money payable therefor.

9.2 The United States shall on or before the twenty-fifth day of each calendar month pay to Seller the amount of money due Seller for the helium-gas mixture tendered for delivery hereunder in the preceding calendar month.

9.3 In the event that a billing statement by Seller is delayed beyond the date when such statement is due as provided in the preceding paragraph 9.1, then the time of payment by the United States as provided in the preceding paragraph 9.2 shall be extended by the period of such delay.

9.4 Seller shall bill the United States separately for any amounts due Seller under paragraph 7.4 of Article VII and under Article XIII, which relate to obligations other than for volumes of helium-gas mixture currently tendered

for delivery under this contract, and the United States shall pay to Seller such amounts so billed within thirty (30) days after receipt of any such billing statement, unless such payment, in whole or in part, would cause the amount of the fiscal year limitation stated in paragraph 2.1 of Article II of this contract to be exceeded, in which event the amount of such excess shall nevertheless be paid to Seller by the United States within said thirty (30) days, if and to the extent funds therefor are otherwise available for carrying out the purposes of the Act. In the event the United States does not pay in full the amount of any such billing as is made by Seller under this paragraph 9.4 within said thirty (30) days because of the fiscal year limitation referred to and the lack of funds otherwise available as aforesaid, the United States shall pay to Seller all such unpaid amounts as soon as possible thereafter to the extent that payment thereof and all other payments due and made under this contract in any subsequent fiscal year do not in the aggregate exceed the amount of the fiscal year limitation stated in paragraph 2.1 of Article II and to the further extent that in any subsequent fiscal year funds therefor are otherwise available for carrying out the purposes of the Act; provided, however, that, regardless of whether or not there are funds available, nothing in this paragraph 9.4 or in this contract shall be construed as in any way affecting the obligation of the United States to pay to Seller the monies due and to become due under this contract, including this paragraph 9.4, up to but not exceeding the aggregate amount of $9,500,000 in any fiscal year, anything in this paragraph 9.4 or in this contract to the contrary notwithstanding.

9.5 In the event that the United States discovers an error in any billing statement, or is otherwise unable to verify the accuracy of the amount of money shown to be due and payable, the United States shall pay the amount

billed or the amount verified, whichever is the lesser, and adjustments of any amounts due shall be made on the billing statement for the succeeding month following correction of such errors or differences. In the event that either party discovers an error in any billing statement, such error shall be corrected and proper adjustment made within thirty (30) days following determination of the extent of such error provided that claim therefor shall have been made within twelve (12) months from the date of such billing statement.

APPENDIX OO

Contract Between United States of America and Cities Service Gas Company

CONTRACT FOR THE SALE AND PURCHASE OF A HELIUM-GAS MIXTURE

Between

CITIES SERVICE HELEX, INC.

And

THE UNITED STATES OF AMERICA

DATED: August 22, 1961

Article VIII

OWNERSHIP AND TITLE

8.1 The helium-gas mixture sold and delivered by Seller to Buyer hereunder, including all of the constituents thereof, shall become the property of Buyer at the point of delivery specified in Article VI hereof.

8.2 Seller hereby agrees to indemnify and save Buyer harmless from any and all claims of third parties to the helium-gas mixture sold and delivered to Buyer under the terms of this contract. Both of the parties hereto agree

that such indemnification and save harmless is subject to the obligation of Buyer to make certain payments to Seller in accordance with paragraph 7.4. Seller agrees further that upon request by Buyer, Seller shall make available at its principal office such documentary evidence as it has in its possession covering Seller's rights, titles, and interests in and to the helium-gas mixture delivered hereunder.

Article IX

BILLING AND PAYMENT

9.1 Seller shall on or before the tenth day of each calendar month render to Buyer a billing statement showing for the preceding calendar month the volume of helium-gas mixture tendered for delivery hereunder, the percentage of helium in such helium-gas mixture, the calculated volume of contained helium therein, and the total sum of money due and payable to Seller therefor.

9.2 Buyer shall on or before the twenty-fifth day of each calendar month pay to Seller at Seller's designated address the amount of money due Seller for the helium-gas mixture tendered for delivery hereunder in the preceding calendar month.

9.3 In the event that a billing statement by Seller is delayed beyond the date when such statement is due as provided in paragraph 9.1, then the time of payment by Buyer as provided in the preceding paragraph 9.2 shall be extended by the period of such delay.

9.4 Seller shall bill Buyer separately for any amounts due Seller for any reason under this contract other than for current helium deliveries, and Buyer shall pay to Seller such amounts within thirty (30) days after receipt of such billing unless such payments would require Buyer to exceed the fiscal limitation expressed in Article II of this

contract and unless funds therefor are not otherwise available. In the event that Buyer should be unable for such reasons to make the required payments to Seller within the specified thirty (30) days, Buyer shall be obligated to make such payments as soon as possible in the current fiscal year or in succeeding fiscal years without exceeding such fiscal limitation.

9.5 In the event that Buyer discovers an error in the billing statement, or is otherwise unable to verify the accuracy of the amount of money should be to due and payable, Buyer shall pay the amount billed or the amount verified, whichever is the lesser, and adjustments of any amounts due shall be made on the billing statement for the succeeding month following correction of such errors or differences. In the event that an error is discovered in the amount in any billing statement, such error shall be adjusted within thirty (30) days following determination of the extent of such error provided that claim therefor shall have been made within twelve (12) months from the date of such billing statement.

9.6 In the event that any payments by Buyer in accordance with paragraphs 9.2, 9.3, and 9.5 hereof are not made within ninety (90) days after the date on which each such payment is due, each such payment shall bear interest from such ninetieth day at a rate of interest equal to the New York bank "prime rate" of interest in effect on such ninetieth day. For the purposes of this paragraph, the due date for such payments shall be the twenty-fifth day of the calendar month as specified in paragraph 9.2. The New York bank "prime rate" of interest is the rate charged on short-term loans to substantial depositors with highest credit rating by the Chase Manhattan Bank.

APPENDIX PP

Petitioners' Named Landowners

RALPH GROUNDS
HENRY HITCH, JR.
CLAUDE ADAMS
ELMER ADAMS
MIKE J. ALBERT
ALFRED M. AKIN
FRANK J. ASHBROOK
CLYDE ADAMS
FRANCES APPLEGET
HEIRS,
FRANK APPELGATE, Agent
REAVLES L. ARNOLD
OSTBY S. AUSTIN
ELANE E. ALBRIGHT
A. E. ALEXANDER
KATHERINE R. ADAMS
PAUL R. BROWN
ARVEL BARNES
E. M. BOWLES
T. J. BAKER
L. H. BRILES
IRENE BOWLES ESTATE,
E. M. BOWLES, Executor
HARRY A. BATHURST
GRANT BLAUSER
DESSIE CAPP BAKER,
Administratrix of the
J. C. CAPP ESTATE
OTTO R. BYERLEY
FLOYD O. and
HELEN J. BOWMAN
DORIS (or LOUIS) BARBY
LULA M. BAGGERLY
MAX BAGGERLY
JERRY BAGGERLY
PEARL (nee Thompson)
BAKER
ORVILLE BELILE
CLARENCE O. BARE
L. MYRTLE BOGART
C. W. BALL
DALLAS E. BARNUM
PETER BALZER
by M. A. HERMS, GUARDIAN
MARGUERITE BLISS
EFFIE BARKER
VERBEL E. BURNS
EUSEBA S. BAIRD
BLOYD BURGESS
JOHN A. BLUE, M.D.
MARY E. BOOTH
FRED BALLARD
JAMES BITNER
ALBERT BARBY
RALPH E. BARBY
RUSSELL BARBY
ALFRED BARBY
LORETTA BLASCO,
Administratrix
J. P. CAMBY, M.D.
D. R. COMPTON
JOHN J. CECIL
L. F. CRITES
MAMIE CLINKINGBEARD
GERTRUDE E. CRAIG,
Administratrix of Estate of
EARL A. CRAIG, Deceased
DILLARD CRAWFORD
EDNA CARPENTER
L. F. CRITES and
BEULAH I. CRITES
BEULAH L. CRUDYINGTON
AVA L. CRAWFORD and
DOROTHY L. DICK
EDITH COLLINS
MRS. BESSIE CARSCALLEN
C. S. CLAYTON
JACK H. and
MAYEBELLE CHENNELL
HAZEL E. CHAMBERS
DOROTHY M. COX
JAY WILSON CUMMINGS

SHIRLEY BARNES CROW,
Heir to CULLEN BARNES
GEORGE A. and
DICIE CRANE
EDNA CARROLL
PAUL A. CUSTER
OSCAR CORNELIUS
MARY L. CHAPMAN
MRS. CECILE BUENZ
ROSCOE BLAUZER
ROY E. BUCK
ERMINE DIMITT
W. B. DERRYBERRY
C. M. DEPUY
ADELLE DAVIS
CECIL L. and
ELIZABETH B. DUER
ANNA DEBNER
C. DABE DUER
HELEN L. DOHERTY
MRS. ANNA DUNHAM
MARY JO DIMBAT, Executrix
of the Estate of
CORA E. EVANS
A. M. and JOSIE DURST
GLENN EASTERWOOD
MRS. G. H. ECKHOFF
MRS. LENA ELLIOTT
HUBERT K. ELROD
WARREN and GLENN
EASTERWOOD and HELEN
EASTERWOOD BOUNDS
PETER ENNS, JR.
COOKE TRUST CO., LTD.,
Administrator of Estate of
WILLIAM ECKSTEIN, Deceased
JOHN and VERNICE
ELDRIDGE
LOLA E. FAURNIGHT
MARY ALE FASSE and
EVA ALE PRITCHETT
HAROLD C. FOWLER
HOWARD J. FIFE
W. H. FULKS
WARREN M. FARRAR
RUTH F. FISCHER
LEON E. FAULEY
J. J. FRENCH
REINHALT C. FISCHER
R. M. FRANKS
E. RUTH FIELDS
ETHEL A. FAUKHOUSER
GEORGE A. FINEFROCK
FRED FLETCHER
IDA B. FARMER
DONALD, NORMAN and
ALLEN FISCHER
HARVEY E. FINFROCK
LOUIS F. FISCHER
GORDON L. GIRCE
JOYCE H. and
JOHN B. GRAY
WINNIFRED GETTO
GRACE GILBERT
DENNIS E. GETZ
JACOB O. GOCHENOUER
L. D. GOOCH, JR.
J. R. GAITHER
J. R. GOODNER
MARION C. GLASKY
ROY L. GREEN
JOSEPH GOODPASTER, SR.
MELVIN GAREY
MELBA GAREY
WM. DeCAMP
RICHARD C. GILCREASE
GENE and FRANCIS
R. GROVE
J. E. GEIST
MOLLIE GALLIART
J. L. GRIMMER ESTATE
L. C. GALE
LEONARD L. GRATH
GEORGE GROTH
EDMOND H. GROTH

MILDRED A. GEIST
MRS. ANNIE GIBLER
MRS. J. F. HAYES
H. S. HAMM
O. R. HEARD
LEE R. HAMMOND
MRS. FRED HODGES
RICHARD HOEME
GARY L. and
MARLIN P. HEGER
J. H. HOFFERBER
O. W. HEGER
EDWIN W. HALVORSON
L. O. HIBBS
J. C. HODGES
ALBERT HODGES
CLAUD HASKELL
LAWTON HARTLEY and
S. M. LADING
WARDEN L. NOE
EDWARD W. HAPPIEST
B. V. HANNA
EDWARD HARLAND
HELEN GREEN HARMAN
MRS. THELMA M. HARPER
LEWIS O. HARRISON
DAISY B. HARRISON
MRS. I. E. HART
JULIA HARVILLE
NINA B. HATCHER
ANNA A. HAYNES
MILDRED LYNCH HELLS
TOM HENDERSON
ADRIAN HICKS
ALMA WRIGHT HINES
W. L. HINSHAW
RICHARD HOEME
MARIA K. HOFFERBER
SPURGEON HELLER
GERTRUDE JENNINGS
R. L. JEWELL
TILGHMAN W. JOHNSON
WILLARD E. JONES
D. RAY JOHNSTON
PEARL N. JULIAN
H. W. JURY
S. G. KANSAS
J. H. KARBER
VIRGIL C. KASER
J. D. KEY
MRS. EMMA KISNER
MARY KLAPMEYER
MISS MARIE W. E.
KLEEMAN
FERN WRAY KLEIHEGE
ETELKA R. KRIEGER
CLARA D. M. KUHLMAN
N. L. LACEY
CLYDE LAMBERT
PEARL LAZENBY
EARLE L. LEEPER
GEORGE R. LENZ
ARTHUR LIESE
RAY LIGHTY
IDA MILDRED
LILLIBRIDGE and
RUSSELL LEE LILIBRIDGE
MRS. L. KEO LLEWELLYN
H. W. LONG
G. F. LUNDAIS
GEORGE LUNDGAN
LUTHERAN CHURCH—
MISSOURI SYNOD—
KANSAS DISTRICT
ARLENE L. LYNCH
LAURA E. LYNCH
SIDNEY J. MANNING
GOLDIE SHAW, Agent
ELLA McMANNIS ESTATE
FRANK MacKAY
BETH B. MAHER

IRENE MAPP
LEE ETTA MARTIN
NEVA MARTIN
THERESA MAYER, formerly
T. E. STOLL
NANNIE MAYER
C. A. McBURNEY
LILLIE MAE McCREIGHT
HILDA TATUM McDONALD
HARRY A. TATUM
MARY TATUM GILLISPIE
C. W. McCOY
C. E. McCAUGHEY
G. C. McCULLEY
MARJORIE McCLAIN
E. E. McDANIEL
PATSY McDANIEL
G. W. McDANIEL
GEORGE T. McDANIEL
HIRAH RALSTIN,
Administrator
SAMUEL D. McELROY
ESTATE
ROBERT F. McFARLAND
J. H. McMORRAN
LES McNERNEY
CARL MENDENHALL
MRS. G. S. MEURE
E. A. McGREW
GEO. McGUIRE
GLADYS A. MENDENHALL
ANNA MENDENHALL
RT. REV. MSGR.
M. T. MECHAN
CARRIE MYERS
EDITH MILES
I. M. MILLER
VEDA L. MILLER
MRS. HATTIE M. MILLER
L. G. MOORE
L. G. MOORE and DELLA M.
DRAKE, joint
C. A. MOORE
ALONZO MOORE
MINORCEE MOON
ROSS MOSHER, JR.
WILLIAM E. and
ANN MUELLER
H. W. MURDOCK
AGNES G. MURPHY
ROBERT MURPHY
ROY MURPHY
CARL and PAULA NIEDEN
RAND (?) A. NIELSEN
HARVEY MIKKEL
L. BERNICE NILES
C. A. NORDBERG, Trustee of
the Estate of J. P. NORDBERG
D. J. O'CONNOR
E. C. ELLENBURGER
FRED OLSON
FRANCIS W. ORMISTON
MARGUERITE F. O'DEA,
Executor of the Will of
LEAH N. KUTZ
GRACIE A. PACK
ETHYL G. PARKER
JAY A. PARR
HOMER LEROY and
LEONA L. PARSHALL
MARGARET WIEM PAULS
NANCY ..... PEDIGO
R. A. PEEK
H. C. PETROWSKY
NETTIE T. PERKINS
HOMER M. PHILLIPS
MRS. IDA M. PHILLIPPE
RUTH C. PIERCE
(ESTATES)
ELIZABETH K. and
JAMES M. RAY
E. A. PICKARTS
JOHN L. PIPKIN
EDDIE T. POWELL
MRS. ALENA (LEONARD A.)
PRINGLE

LELA M. ROSS
LOTTIE E. ROWLAND
C. F. SCHERB
A. M. SCHMIDT ESTATE
H. R. SCHOOLEY
MRS. VIVIAN W. SCHUETT
C. W. SARBRO
HILDA SCRANTON
DOTTIE and J. D. SEEGER
AVES M. SEARING
GOLDIE SHAW
ALBERTA N. SHAW
C. M. SHIPTON
MABLE SHAY
MAE D. SHERER
W. A. SHERWOOD
ANNA M. SCHROEDER
ROGER SHAFFER
J. L. SHIVER
MRS. MINNIE SHIVES
O. L. and MARY E. SILER
J. W. SKELLEY
MRS. EARL SMALLEY
EDWARD W. SNOWBARGER and GEO. W. SNOWBARGER, Joint Owner
DANIEL V. SNYDER
MARION R. SOUTHERN
LOLA E. SPAETE
PAUL SPRADLIN
CARL R. STALCUP
DONNA STARKS
KATIE STEVENS by ELMO M. COMPTON, Guardian
FRANCES M. STINCHCOMB
DOROTHY M. STOUT
MARIE D. STROBEL
R. J. STUCKEY
HENRY SUMMERS
W. B. SUMMERS
THOMAS B. (JAKE) SULLIVAN
LINDA SWINGER
MRS. MYRA MAY TAYLOR
BERTHA PERRING TAYLOR (MRS. C. WILLETT TAYLOR)
GLENN TUL
RUSSELL THOMPSON
ALBERT THRALL
HATTIE LOU HOWE, Administratrix CHARLES C. THOMAS ESTATE
NEVA B. TIBBETT
HARRY TIMBERLAKE
PEARL M. TRINKNER
MEL TOWNER
VAN R. TOWNER
GEORGE N. TOWNER
LAWSON TUCKER
FLOYD R. TOWNER
ZELMA STOLTZ TURNER
FLOYD TUTTLE
VELMA J. TWOMBLY nee MRS. O. S. JOHNSON or VELMA JOHNSON
FRED UKENA
JEAN UKENS
WALTER UKENS
EMIL UKENS
MADGE UKENS
A. P. UTKINS (or A. T. ATKINS)
MYRTLE VACHA
CARL D. VAIRD
J. B. VARLES
FRED BEDDER
DEAN TULL

HENRY G. and MARTIN H. VOGT and LENA A. VOGT and KATHERINE VOGT LEACH
BENJAMIN H. and EUNICE M. WAGNER
NINA WALL
ROBERT C. WALLACE
MASON WARNER—VIVIAN WARNER, Attorney in Fact
FRANCES U. C. WARNER
W. J. WEBER
RUSSELL WEEKS
..... V. WEAR
ELMER WAYMEN
C. A. WEBB
MRS. C. A. (HAZEL) WEBB
LILLIAN B. WEDEMEYER
GEORGE L. WEDEMEYER
HELEN E. WEIRAUCH, Executrix
GEORGE WEIRAUCH ESTATE
MARY WEST
RUTH (?) WESLEY
J. MINTER WHERRITT
GEORGE H. WIGGINS, Administrator
LOLITA WIGGINS ESTATE
DORIS CROWTHER WHITE
CORA LOU WILLIAMSON
MRS. HELLA WILSON
CHARLES WINTER
GEORGE WINCHELL
H. L. WITT
ELLEN STYLES WOODARD
SAMUEL WOLF
MILDRED M. YADON
CLARABELLE YOUNG
SAM ZABEL
JOHN E. ZOOK

MARY OLIVE ALBAN
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APPENDIX QQ

List of Parents and Subsidiaries of National Helium Corporation, Panhandle Eastern Pipe Line Company in Pursuant to Rule 28

This list is submitted in compliance with Rule 28 of the Supreme Court Rules.

Petitioners are National Helium Corporation and Panhandle Eastern Pipe Line Company. The parents of National Helium are National Distillers and Chemical Corporation and Panhandle Eastern Corporation (PEC). Panhandle Eastern Corporation is also the parent of Panhandle Eastern Pipe Line Company.

The subsidiaries (other than wholly owned subsidiaries) and affiliates of petitioners and of their parent companies are as follows:

Stingray Pipeline Co.

Southwest Gas Storage Co.

Dome Arctic Ventures

Cogas Development Co.

Northern Border Pipeline Co.

National Helium Corp.

Lachmar

Anadarko Italiana S.p.A.

Norden Limited Partnership

Dixilyn-Field Rocky Mountain Drilling Co.

Dixilyn-Field (Nigeria) Ltd.

Ravencliffs Development Co.

Premier Coal Co.

North Antelope Coal Co.

Rochelle Coal Co.

Alaskan Northwest Natural Gas Transportation Co.

John de Kuyper & Sons, Inc.

National Petro Chemicals Corp.

Caves Laurent Perrier, Inc.

Poliolefinas S.A.

Colorthene Ind. e Com. Ltda.

Polidina S.A.

Sheldahl Narquinas Ind. e Com. Ltda.

Vinhos Finos Santa Rosa S.A.

Quinic, S.A. de C.V.

USI Far East Corp.

Actagen, Inc.

APPENDIX RR

Excerpt From Testimony of Henry Wheeler, Page 887

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Q. Has the Bureau of Mines always considered that the owner of the gas stream also owns the helium contained therein? A. Yes, sir.

* * *

[Vol. 66, p. 6329] Q. Do you know how these sites were selected? A. They were selected on the basis of the availability of an adequate supply of helium-bearing gas to support a plant.

* * *

[Vol. 66, p. 6336] Q. (By Mr. France) What was the purpose of the Department of the Interior in including a provision in the bill relating to the Natural Gas Act? A. Well, we were interested in attracting private industry participation in this program, and we thought that in order to do this we had to provide an adequate profit motivation to the companies which would be commensurate with the risks that they would take in the helium program, and we were concerned that without some reference to the Natural Gas Act in this legislation the Federal Power Commission would take whatever profits that the companies involved in our program might make and apply them in such a way as to reduce the cost of gas to the consumers, and we didn't want this to happen.

Q. That was because you felt if it did happen it would make it more difficult for you to contract with private industry? A. We didn't think we could get industry participation if the companies could make only a public utility rate of return on their investment.

* * *

Respondent's Brief

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No. 81-1919

In the Supreme Court of the United States

October Term, 1981

RALPH GROUNDS, ET AL. (Landowners Group),
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.
(Lessee-Producer Group),

AND

NORTHERN NATURAL GAS COMPANY, ET AL.
(Helex Group),

AND

UNITED STATES OF AMERICA, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSTITUTION

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No. 81-1919

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AND

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UNITED STATES OF AMERICA, *Respondents.*

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STATEMENT

Respondents, Panhandle Eastern Pipe Line Company and National Helium Corporation, are the petitioners in Case Number 81-1920, filed in this Court on April 19, 1982, seeking review of the same consolidated litigation as is involved in this case.[1] The Respondent, Panhandle Eastern Pipe Line Company, in addition to being a member

1. The list of parent, subsidiaries and affiliates of these Respondents required by Rule 28 appears in the Joint Appendix in Cases Nos. 81-1919, 81-1920, 81-1921 and 81-1922, at QQ, A672.

of the pipe line and helium extractor group (Helex Group), was the producer of approximately 1/3 of the natural gas processed by its affiliated helium company, National Helium Corporation. As such, the trial court found that the respondent Panhandle Eastern "willingly, or unwillingly, comes within the definition of the class of Lessee-Producers. . . ." *Northern Natural Gas Company v. Grounds*, (1974) 393 F.Supp. 949, 987. (App. A111) Thus, these Respondents are vitally concerned with the issues presented by the landowner petitioners in their petition for certiorari and with the positions which they have taken with respect thereto.

ARGUMENT

As demonstrated by these Respondents in their petition for certiorari filed in Case Number 81-1920, they have been deprived of contract rights in violation of the due process guarantees of the Fifth Amendment to the United States Constitution, principally, in that the Tenth Circuit Court:

(1) Has disregarded the holding of this Court in *Phillips Petroleum v. Texaco, Inc.*, 415 U.S. 125 (1974) by creating a utility type of rate making scheme under federal law to regulate the Helex Group rather than to apply quantum meruit under state law;

(2) Has written contracts de novo for the benefit of third parties in contradiction of findings made by the trial court, and

(3) Through the rationale of "the law of the case doctrine," determined that vital issues in this

case are concluded because similar matters were decided in another case involving different parties and different facts.

However egregiously these Respondents may feel they have been treated, it is no greater an injustice than the utter disregard of due process and fair play suffered by the landowner petitioners. With respect to the primary issue with which they are concerned—the split of recovery as between their group and the lessee-producer group—the Circuit Court has told them that the matter has been decided *in absentia,* in a case in which no royalty or landowner group was present or represented. (Ashland I)

While these Respondents support the landowners to the extent of urging that they should have their day in court on a matter of great importance to them, we would not want this Court to think that we agree with the landowners' conclusions of law with respect to the merits of the singularly important issue. The landowners appear to have assumed that once they establish that the issue should be controlled by the state law of quantum meruit, it is a foregone conclusion that they are entitled to 50% of any helium recovery. In this they are overlooking a fundamental principle of law.

In applying quantum meruit as mandated by this Court in *Phillips v. Texaco, Inc.,* supra, they have overlooked the basic Kansas law which permits equitable recovery under quantum meruit only in the absence of specific applicable contract provisions. *Hillyer v. Pan American Petroleum Corporation,* 348 F.2d 613, 623 (10th Cir. 1965).

In the present situation, the relationship which exists between landowners and the lessee-producers is brought

about and governed by the oil-gas leases. The 10th Circuit Court has said that helium is one of the components of the natural gas stream covered by the leases—and no party to this litigation is contradicting that holding at this point. There is no authority for, nor can it be said in logic, that the parties may pick and choose the various parts of the leases which apply to helium and conclude that the granting clauses cover helium—but the royalty provisions do not. The royalty clauses are specific and provide for a division of "proceeds" or "market value". The trial court found that the royalty owners' share under leases in the United States varies from 10% to 95%. (App. A118) The rate specified in a given lease is the share of the helium recovery which the royalty owner should receive.

It is worth noting that in arriving at the fifty-fifty split, the trial court relied on no authority. It is as if the Court reached up in the air and pulled out a number. Not even hard evidence may be considered "which will vary, alter or contradict the express written provisions of the written leases. . . ." *American Crystal Sugar Co. v. Nicholas*, 124 F.2d 477 (10th Cir. 1941).

CONCLUSION

Beyond doubt, this litigation has received unusual and unprecedented treatment resulting in peculiar if not bizarre results. We urge that the petition should be granted in this case as well as the Respondents' petition in Case Number 81-1920 and the petitions in the companion cases numbered 81-1921 and 81-1922 filed by Northern Natural Gas Company, et al. and Cities Service Gas Company, et al., respectively.

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Nos. 81-1919, 81-1920, 81-1921 and 81-1922

In the Supreme Court of the United States

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Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.,
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

NORTHERN NATURAL GAS COMPANY, ET AL.,
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

CITIES SERVICE GAS COMPANY, ET AL.,
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF AMOCO PRODUCTION COMPANY, ET AL.

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QUESTIONS PRESENTED

1. In this helium litigation commenced in 1963, should this Court now consider reviewing liability questions finally decided in the separate liability phase of the cases, over ten years ago in *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951, 1063 (1972)?

2. Did the court below properly approve application of the gas industry method of valuing gas components extracted from gas streams by deducting the costs and value added by the extraction process from the known market value of extracted helium, when this objective industry method has traditionally been applied by the courts?

3. Did the court below have discretionary power to abate the *en banc* status of an argued and submitted case after it has entered an *en banc* decision in a companion case in which all petitioners were accorded the right to participate as *amici curiae*, as well as participate in consolidated arguments in all cases, and in additional arguments and briefing after termination of the *en banc* status?

LIST OF COMPANIES AS REQUIRED BY RULE 28.1

AMOCO PRODUCTION COMPANY

- Standard Oil Company (Indiana)
- Amoco Canada Petroleum Company, LTD
- Amoco Credit Corporation
- Amoco Oil Holding S.A.
- Amoco Pipeline Company
- Analog Devices, Inc.
- Cetus Corporation
- Chicago Bank of Commerce
- Amoco (U.K.) Exploration Company
- Solarex

ASHLAND OIL, INC.

- Arch Mineral Corporation
- Ashland Coal, Inc.
- Etablissement Locab
- Ashland-Otilub S.A. Industria Quimica
- Super Mom's Kitchens, Inc.
- B.V. Ashland-Suedchemie V/h Necof
- CARBOGAL-Carbonos de Portugal SARL
- Gravcap, Inc.
- Iberia Ashland Chemical S.A.
- Locap, Inc.
- Loop, Inc.
- Melamine Chemicals, Inc.
- Minnesota Pipe Line Company
- Parish Pipe Line Company
- Saudi Industrial Resins Limited

Tecumseh Pipe Line Company
United Carbon India, Limited
Australian Carbon Black Pty. Ltd.
Malaysian Carbon Sdn. Bhd.
P.T. Indocarb
Negroven, S.A.
Ashland-Avebene
Ashland Croda Pty. Ltd.
Ashland De Mexico S.A. de C.V.
Ashland Resinas Sinteticas, Ltda.
Ashland-Suedchemie-Kernfest GmgH
Ashland-Suedchemie-Gremolith AG
George Hantos & Co, OHG
Kernfest-Webac, A.B.
Oleotecnica, S.A.
Arch Mineral Corporation
Medicine Bow Coal Company
Cresent Petroleum Company
Ashland Exploration (U.K.) Ltd.
Ashland Oil (Nigeria) Company
Cumberland Materials, Inc.
Ashland Coal, Inc.
Delmar Plaza Associates
Maplewood Corporation
Travelers Inns of Charlotte, Inc.
Travelers Inns of Winston-Salem, Inc.
Travelers Inns of Wytheville, Inc.
Mikropul G.m.b.H.
Transdutos Engenaria Limitada, S.A.
Seapac Chemical and Trading Co. (Pte.) Ltd.
Resource Sciences Gulf Limited
Williams Brothers Iran Consulting Engineers

Resource Sciences-Arabia Ltd.
Williams Brothers Canada Limited
Northern Engineering Services Company Limited
Wicmap Transport Pty. Ltd.
Resource Sciences Malaysia Sdn. Bhd.

ATLANTIC RICHFIELD COMPANY

Alyeska Pipeline Service Company
Badger Pipe Line Company
Black Lake Pipe Line Company
Chapin, Kieley & Howe, Inc.
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Flower Street Limited
Gas De Chile S.A.
Gravity Adjustment, Inc.
Hardy Oil Company
Hydrokem Performance Chemicals Company
Iricon Agency Ltd.
Kenai Pipe Line Company
Lavan Petroleum Co.
Montoro, Empresa Para La Industria Quimica
Nihon Oxirane Company, Ltd.
Oil Shippers Service, Inc.
Platte Pipe Line Company
Sinclair Venezuelan Oil Company
Techumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company

CABOT CORPORATION

Austrialian Carbon Black Pty. Limited
Berylco Cabot Metaux Speciaux
Cabot Alloys (U.K.) Limited
Cabot Argentina Sociedad Anonima Industrial y Comercial
Cabot Belguim, S.A.
Cabot Carbon Limited
Cabot Columbiana, S.A.
Cabot do Brasil Comercia e Industria Limitada
Cabot Exploration International Corp.
Cabot France, S.A.
Cabot GmbH
Cabot Insurance Co., Ltd.
Cabot Italiana Societa per Azioni
Cabot Plastics Limited
Cabot S.A.
Cabot Safety Limited
Deloro Stellite (U.K.) Limited
Cabot Stellite Europe Limited
Capuava Carbonos Industriais, S.A.
Deloro Stellite AB
Deloro Stellite GmbH
Deloro Stellite Iberica S.A.
Deutsche Beryllium GmbH
Energy Transport Limited
High Performance Alloys Company
Ingal International Gallium GmbH
Iran Carbon Company, Ltd.
N.V. Kawecki-Billiton Metaalindustrie
Kawecki-Billiton (U.K.) Ltd.

KBI Export Corp.
Showa - KBI Co., Ltd.
Showa Cabot Kabushiki Kaisha
Tugfork Corporation
White Shoal Pipeline Corporation
Malaysian Carbon Sdn. Bhd.
Tantalum Mining Corporation of Canada, Limited
Materiaux et Produits Electroniques et Nuclearies S.A.R.L.
Nickel-Contor Deutschland GmbH
Nickel-Contor AG fur Nickel und Nickellegierungen
Cabot Alloys France
Technologica Vertriebsgesellschaft fuer technische Erzeugnisse GmbH

DORCHESTER GAS CORPORATION

Dorchester Coal Company
Dorchester Enhanced Recovery Company
Dorchester Enterprises, Inc.
Dorchester Development Corporation (sub of Enterprises)
Dorchester Exploration, Inc.
Dorchester Gas Producing Company
Dorchester International, Inc.
Dorchester Liquid Gas, Inc.
Dorchester Liquids Transportation Corporation
Dorchester Pipeline Company
Dorchester Refining Company
Dorchester Sea-3 Products, Inc.
Dorchem, Inc.
Rosamond Drilling Company, Inc.
Arabian Shield Development Company
Del Norte Technology, Inc.

HELMERICH & PAYNE, INC.

Atwood Oceanics, Inc.

TEXACO INC.

African Petroleum Terminals, Ltd.
American Overseas Petroleum Limited
Arabian American Oil Company
Badger Pipe Line Company
Caltex Deutschland GmbH
Caltex Mediterranean Limited
Caltex Petroleum Corporation
Colonial Pipeline Company
Coltexo Corporation
Deutsche Texaco Aktiengelsellschaft
Dixie Pipeline Company
Explorer Pipeline Company
Ful-Tex Euro Services Inc.
Kaw Pipe Line Company
Laurel Pipe Line Company
LOCAP Inc.
Loop Inc.
Neches Butane Products Company
Olympic Pipe Line Company
Pipelines of Puerto Rico Inc., The
P.T. Caltex Pacific Indonesia
Refineria Texaco De Honduras, S.A.
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Sociedade Anonima de Oleo Galena-Signal
Societa Per Azioni Raffineria Padana Olii Minerali Sarpom
Texaco Angola-Prospeccao e Producao

Texaco Butadine Company
Texaco Canada Inc.
Texaco-Cities Service Pipe Line Company
Texaco Gabon
Texaco Ghana Limited
Texaco Inc.
Texaco Maroc
Texaco Mexicana
Texaco Nigeria Limited
Texaco Overseas (Nigeria) Petroleum Company
Texaco Togo
Texas-New Mexico Pipe Line Company
West Shore Pipe Line Company
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Nos. 81-1919, 81-1920, 81-1921 and 81-1922

In the Supreme Court of the United States

October Term, 1981

RALPH GROUNDS, ET AL.,
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.,
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

NORTHERN NATURAL GAS COMPANY, ET AL.,
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

CITIES SERVICE GAS COMPANY, ET AL.,
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF AMOCO PRODUCTION COMPANY, ET AL.

STATEMENT

These statutory interpleader cases were filed in 1963 to determine the extent of liability by pipeline companies and their affiliates or subsidiaries to gas producers and landowners, for the value of helium extracted from natural gas going to fuel markets. The extracted helium was sold under long-term contracts to the United States which transported it to underground storage facilities in Texas, so that it would be available for future use when the gas fields became depleted.

A liability-phase trial was completed in 1968 after forty days of trial had resulted in a mammoth record, including 1,611 exhibits and an index to the record on appeal of 234 legal size pages. Liability was finally imposed on the helium extractors in *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951, 1063 (1972). (A. 133). All the present petitioners herein also petitioned this Court at that time for review of the same liability questions which they again pursue, after another ten years of litigation has been devoted to the valuation phase of the cases.

Prior to the 1968 district court trial of liability, certain companion claims for helium value against one of the four helium extractors, Phillips Petroleum Company, were carved out of these cases for jurisdictional reasons, and were later tried in Oklahoma, in a separate diversity jurisdiction case. (A. 468). Appeals from that companion case which made helium valuation determinations, were also taken to the court below. All present petitioners participated as *amici curiae* in briefing and oral arguments in that appeal in March, 1974.

After submission of the Oklahoma case for decision on the appeal, the district court in these Kansas cases rendered

a decision rejecting the widely used industry and government valuation method which is applied when components of natural gas are extracted for separate marketing, and which had been recognized and applied by the Oklahoma court. (A. 28). The appellate panel in the Oklahoma appeal then affirmed the use of the objective valuation method (A. 561), which determined extracted helium value by taking its known market value as helium, after extraction, and deducting the expenses and value added by the extraction function in order to arrive at its value prior to extraction. There being no comparable sales to look to for the valuation purpose, the objective industry and government-approved method, as also applied by courts in minerals extraction cases, became the only tenable method under the circumstances. But the Kansas trial court in these cases had rejected that method and relied in large part on speculative theories never accepted as a basis for valuation.

However, in order to give petitioners in these cases an additional hearing on these questions, the court below granted a rehearing *en banc* in the Oklahoma appeal, to be consolidated with a hearing *en banc* in these cases, to determine whether the prior panel decision in the Oklahoma case was correct, in light of the decision in these cases from Kansas; and to determine whether there were material differences in the cases.

After complete briefing on consolidated records, and after consolidated oral arguments, the *en banc* court issued a decision affirming in principle the Oklahoma case, but remanding for further evidentiary hearing certain factual aspects of the "workback" valuation method approved by the court. *Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d 381 (10th Cir. 1977), cert. denied, 434 U.S. 921, 968. (A. 429). Both the United States and Phillips

Petroleum Company sought review in this Court of all liability questions and the valuation determinations, but these were denied.

After the Oklahoma district court held a trial on the factual questions remanded by the foregoing *en banc* decision, the parties again appealed. The district court decision was affirmed, except as to the issue of prejudgment interests. *Ashland Oil, Inc. v. Phillips Petroleum Company*, 607 F.2d 335 (10th Cir. 1979), cert. denied, 446 U.S. 936 (1980). (A. 385). Phillips Petroleum Company again sought review in this Court of liability questions, which was denied; while Ashland Oil, Inc. sought review of issues related to valuation, which was also denied.

Since the *en banc* court below had essentially resolved the question of the appropriateness of the valuation method appropriate in these helium cases in its 1977 decision, after several complete hearings involving all parties herein, the court exercised its discretion to terminate the *en banc* status of these cases. (A. 330). It ordered another hearing for all parties, and gave the opportunity for further briefing. Thereafter the decision below was duly rendered. (A. 1).

Petitions for rehearing and suggestions for rehearing *en banc*, raising the points now repeated here, were filed. The court requested responses to those petitions. After consideration thereof, the petitions for rehearing, and suggestions for rehearing *en banc* were denied. (A. 512).

ARGUMENT

The general, and specific, liability questions raised in each of the four petitions were finally decided by *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951, 1063. This was a separated liability phase trial based upon a complete pretrial order resulting in a massive record including the facts now relied upon again in these petitions.

A judgment determining liability and remanding only valuation issues for trial in the separate valuation phase, is considered to be "final" in later appeals from the valuation proceedings. *United States v. Turtle Mtn. Band of Chippewa Indians*, 612 F.2d 517, 520 (Ct. of Clms. 1979). It is interlocutory only in the sense that a final monetary amount has not been fixed. In the 1971 petitions to this Court in the liability phase it was recognized that the decision was final at that time for the purpose of review. No one suggested otherwise.

The helium valuation and procedural questions raised by petitioners are plainly without merit, and present no grounds for review by this Court.

With that background and summary, we shall briefly comment on each of the four petitions.

No. 81-1919, Ralph Grounds, et al., Petitioners

These "landowner" petitioners, who gave oil and gas leases on their lands, from which helium-bearing gas was produced, seek to avoid the provisions in their leases specifying a fractional royalty, normally 1/8th of the proceeds or value of the gas, and to obtain a higher royalty.

They fail to accept the full extent of the *Grounds* decision in 1971 which held that "the grant of gas by the

leases covered all components of the gas, including helium." (A. 153). The 1/8th royalty on "gas" therefore was obviously applicable. These petitioners were, of course, parties to the case.

Their reliance on *Phillips Petroleum Company v. Texaco, Inc.*, 415 U.S. 125 (1974), is totally misplaced. That case only decided that the gas producers' right of recovery for helium, as decided in *Grounds I*, was in *quantum meruit*, and that applicable federal law precluded certain state law defenses to the required payment. Thus, federal jurisdiction did not exist. Once the gas producer recovers for the helium gas value, he owes the fractional royalty required by his separate lease contract with the landowner. The transaction represented by the lease contract was in no sense superseded by any federal or state laws, and thus is governed according to its terms, which includes the specific provision for a fractional royalty on gas.

The Tenth Circuit recognized that aspect of the *Grounds I* decision in rejecting landowner arguments seeking to split hairs about its meaning in the *en banc* Ashland decision, 554 F.2d 381 (*Ashland I*). (A. 429). Landowners had there participated as *amici curiae*, as well as in consolidated arguments in these cases on that question, at the later *en banc* hearings.

Landowners' questions presented in its Petition, therefore, simply do not exist in the record of these cases. They are premised upon a misinterpretation of *Grounds I* and of *Phillips Petroleum Company v. Texaco, Inc.*, 415 U.S. 125 (1974). Neither can they cite any definitive state case, or law, which supports their theory for avoiding the royalty fraction specified in their leases.

No. 81-1920, Panhandle Eastern Pipe Line Company, et al., Petitioners

These petitioners in their first "question", raise the same liability questions which they raised in 1971, in these same cases, in petitions for a writ of certiorari.

Their reliance on this Court's later jurisdictional decision in *Phillips Petroleum Company v. Texaco*, 415 U.S. 125 (1974) is misplaced. This Court there recognized the basis of the *Grounds I* decision, i.e., that payment of rates for natural gas under federal regulation "will not be regarded as payment for the helium constituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium."

The "filed rate doctrine" requires that the field rate be the only legal rate for the regulated commodity, and supersedes contract provisions to this extent. In recognizing and applying the doctrine in construing the Natural Gas Act, this Court, in *Arkansas Louisiana Gas Co. v. Hall*, ... U.S. ....., 69 L.Ed. 2d 856 (1981), invoked the same Interstate Commerce Act cases which *Grounds I* relied upon and applied.

It is this long-established federal law, ignored by petitioners, which precludes the contract defenses and related defenses, which petitioners again attempt to rely upon, as they did in 1971.

The Minimum $2.00 per Mcf. Value

Petitioners' attack on the minimum $2.00 per Mcf. value ascertained by the court below borders on the frivolous. National Helium Corporation's extraction costs, according to petitioners' own trial exhibit, were $6.94 per Mcf. out of revenue of $12.41 per Mcf. These costs included an intra-affiliate transfer from petitioner Na-

tional Helium Corporation to petitioner Panhandle Eastern Pipe Line Company of $2.16 per Mcf. for helium, plus additional amounts for shrinkage. (Panh. Ex. 113, p. 1239 of Helex App. of Ex.; LP Ex. Add., p. 174; Helex App. Ex. Vol. I, p. 74). Commingled helium value, therefore, necessarily exceeds $3.00 per Mcf., an amount approved in *Ashland II*.

The $2.00 figure was recognized as having arisen in earlier years, before prices rose substantially. Even the helium extraction companies, before these suits arose, considered $2.00 as "nominal", and far below true value. (LP Ex. 2-58; LO Ex. 1-212, LO Suppl. App. Ex. pp. 18-19). The Court of Claims found a value of $2.99 per Mcf. for helium produced in gas as early as 1944. *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (1966).

In the helium conservation contracts with the United States, the helium extracting contractors agreed to make payment to third parties found to be entitled to payment, and assumed the obligation up to about $3.00 per Mcf., after which the government was to reimburse them for any payments required about that level. This was essentially to provide for payment to lessee producers, the third parties who supplied the gas. (See footnote 2 in *Grounds I*, A. 142).

Petitioners fail to discuss or refer to the plain language in their own contract requiring that payment (A. 626, para. 7.5), which the court below merely applied to the undisputed facts.

"Law of the Case" in Applying the En Banc Opinion in Ashland I

Since the Oklahoma case, *Ashland Oil, Inc. v. Phillips Petroleum Company*, was initially carved out of these

Kansas cases, and all parties participated in appellate hearings in all the cases several times, it offends one's notions of equal justice, and consistency in our legal process, to see petitioners make overstated contentions that the results in these Kansas cases should be different. It is just as irrational to contend that the court should not have followed the *en banc* decision in *Ashland I*, when that decision was made only after petitioners themselves had argued and presented briefs as *amici curiae*, and again in consolidated hearings. The full record was reviewed in both cases so as to obtain a consistent and reasonable result.

It is probably academic to debate the question whether the *en banc* decision in *Ashland I* should be followed because it is *stare decisis*, or because it is the law of the case. Once it became evident that certain transactions relied on by petitioners as governing valuation of helium were not comparable under the criteria applied in *Ashland I*, the ruling of *Ashland I* approving the accepted workback method over speculative testimony, not grounded in helium sales transactions, was required under any concept of consistency in legal application. It may properly be inferred that the *en banc* Court in *Ashland I* would not have announced the rules it did after hearing the appeals in all the cases, had it not considered them appropriate.

Certain it is that *stare decisis* is inadequate to describe the binding nature of *Ashland I*, because of the contemporaneous similarity of the facts and legal relations of all parties, and the consolidated appellate hearings which were held. *Stare decisis* "accepts a former decision as controlling because the conclusions reached and the reasoning used therein are applicable to the case at bar." 1B *Moore's Federal Practice*, Sec. 0.402, p. 56. "As in the case of *stare decisis*, the federal doctrine of the law of the case

applies to principles of law enunciated by the trial court and by the appellate courts." 1B *Moore's Federal Practice*, Sec. 0.404(1), p. 402. The doctrine of the law of the case is the "twin brother" of *stare decisis*. *Cochran v. M & M Transportation Co.*, 110 F.2d 519, 521 (1st Cir.).

Accordingly, where the cases are closely related, the difference in parties will not preclude the first decision from being the "law of the case", *Zdanok v. Glidden Company*, 327 F.2d 944, 953 (2nd Cir.), because "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." (327 F.2d at 953).

The rationale of applying the law of the case as laid down in *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981), therefore, obviously applies in these proceedings. This is not a question of whether a *judgment* in one case is binding in another, but whether a *principle* established in closely similar, if not identical cases, which have been consolidated for hearing because of their similarity, should be consistently applied. Thus, we have no question of *res judicata* or collateral estoppel, and no question of due process.

While a judgment, as such, cannot be entered affecting rights of an absent party, the very purpose of such doctrines as *stare decisis*, and law of the case, is to apply a rule laid down in a similar or identical setting. *Utilities Production Corporation v. Carter Oil Co.*, 72 F.2d 655, 662 (10th Cir.); *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212, 217, 46 L.Ed. 1132, 1135 (1902).

Nos. 81-1921 and 81-1922, Northern Natural Gas Company, et al., and Cities Service Gas Company, et al., Petitioners

The only questions raised by these petitioners, in addition to those in the other petitions discussed above, are complaints by them that the court of appeals erred in exercising its discretion to abate one proceeding to prevent unnecessary and wasteful duplication, and in terminating the *en banc* status of these cases, once the *en banc* court had heard all cases, and made one definitive *en banc* decision on the common questions presented.

These are clearly discretionary matters of procedure which protected, rather than impinged upon, petitioners' constitutional rights. The repeated hearings on all questions in all cases, which petitioners participated in, emphasizes the caution and care taken by the court to safeguard the parties' rights, as well as to arrive at a correct and well considered judgment based upon the evidence.

Western P.R. Corp. v. Western P.R. Co., 345 U.S. 247 (1953), makes clear that:

> ". . . how the en banc power was to be exercised was to rest with the court itself . . ." (345 U.S. at 252)
>
> Parties have no right "to have their cases passed upon by more than three circuit judges." (345 U.S. at 253)
>
> Litigants have no right "pertaining to arrangement of [the court] calendar and the assignment of its cases to division." (345 U.S. at 258)
>
> ". . . each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that [en banc] power shall be exercised." (345 U.S. at 259)
>
> ". . . the court should determine and clearly set forth the particular procedure it will follow, hence-

forth, in exercising its en banc power." (345 U.S. at 268).

Rule 35 of the Federal Rules of Appellate Procedure, as amended, governs *en banc* procedure, and implements 28 U.S.C. Sec. 46, as amended, providing for three judge panels. The Rule preserves the discretionary power of the court over *en banc* procedures.

Just as the power to deny an *en banc* hearing clearly encompasses the power to limit such a hearing to a given issue without oral argument, *Securities and Exchange Com'n v. Texas Gulf Sulpher Co.*, 446 F.2d 1301, at 1310 (2nd Cir.), cert. denied, 404 U.S. 1005, so that same power must encompass the power to terminate, vacate or otherwise modify a prior order for an *en banc* hearing. *United States v. Collins*, 462 F.2d 792, at 802 (2nd Cir.), cert. denied, 409 U.S. 988; *United States v. Rosciano*, 499 F.2d 173 (7th Cir.).

When to hold, or "when not to hold, an *en banc* hearing is within the discretion of this court." *United States v. Martonorano*, 620 F.2d 912, at 921 (1st Cir.), cert. denied, 449 U.S. 952.

Similar authorities are collected in an Annotation, *En Banc Proceedings in Federal Courts of Appeals*, 37 ALR Fed. 274.

Once having granted a hearing *en banc*, the Court had discretion to vacate the *en banc* order upon an appropriate vote of its active judges.

CONCLUSION

The four petitions primarily raise liability questions which were finally disposed of ten years ago. The strong

public policy of finality in judicial proceedings requires denial of these petitions.

The incidental valuation and procedural matters were all carefully resolved in a consistent and rational manner by the court of appeals after every petitioner was given repeated opportunity to be heard.

Moreover, the court procedures followed were discretionary, and wisely exercised to avoid duplication. This enabled an orderly examination of all available evidence before applying well-settled legal principles in resolving the controversy.

The legal questions resolved below are narrow ones confined to this localized litigation. Simply stated, there is no reason for this Court to review the latest decision applying rules this Court has already declined, several times, to review in this very litigation. There is every good reason to decline review, including the many years of delay in concluding this litigation. From this delay, the petitioning helium extractors continue to profit by millions of dollars each year.

The petitions should be denied.

Respectfully submitted,

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Opposition

2

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No. 81-1919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RALPH GROUNDS, *et al.* (LANDOWNERS GROUP),
Petitioners,

vs.

MOBIL OIL CORPORATION, *et al.*
(LESSEE-PRODUCER GROUP),
AND
NORTHERN NATURAL GAS COMPANY, *et al.* (HELEX GROUP),
AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GULF OIL CORPORATION, A LESSEE-PRODUCER

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May 1982

QUESTION PRESENTED

Whether this Court should overrule two decisions which hold that petitioners are to be paid royalty on commingled helium at the rates provided for in Kansas, Texas and Oklahoma oil and gas leases which they executed and delivered to respondent lessee-producers. These two decisions are *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972) and *Ashland Oil, Inc. v. Phillips Petroleum Co. v. United States*, 554 F.2d 381 (10th Cir. 1977), *cert. denied*, 434 U.S. 921, 968 (1977).

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No. 81-1919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RALPH GROUNDS, *et al.* (LANDOWNERS GROUP),
Petitioners,

vs.

MOBIL OIL CORPORATION, *et al.*
(LESSEE-PRODUCER GROUP),
AND
NORTHERN NATURAL GAS COMPANY, *et al.* (HELEX GROUP),
AND
UNITED STATES OF AMERICA,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT GULF OIL CORPORATION, A LESSEE-PRODUCER

STATEMENT

Nature of the Actions

These are six consolidated class actions in the nature of interpleader brought under 28 U.S.C. § 1335 in the District Court for the District of Kansas by the respondent Helex Group against two groups of defendants, one the respondent lessee-producers, the other the petitioner landowners, to determine adverse claims to interpleaded funds, which are the proceeds received by the Helex Group from the sale of 23.4 million Mcf of crude helium to the United States during the Helium Conservation Program, which was in effect from 1962-1973, pursuant to the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. § 167 et seq. The United States intervened and aligned itself with the Helex Group.

This is the second appeal of these actions. On the first appeal the landowners claimed the entirety of the interpleaded funds on the ground that commingled helium was not covered by the oil and gas leases which they had delivered to the respondent lessee-producers. But the Court rejected this claim. It said, "We conclude that, absent specific reservations, the grant of gas by the leases covered all components of the gas, including helium". *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 at 715 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). (J.A. A153). (hereinafter *Grounds I*). It did hold "the Helex companies must account to the lessee-producers for the reasonable value of the helium contained in the processed gas and the lessee-producers must pay royalty on such value to the landowners". *Id.* at 707. (J.A. A137).

This decision ended the liability phase of these cases, which had been divided from the beginning into

a liability phase to be tried first and a damage phase to be tried later if necessary. The Court accordingly remanded the cases to the District Court for the trial of the damage phase, which is these cases which have come to be known as *Grounds II*.

At this trial the District Court, in addition to considering the value of commingled helium, held that "a helium royalty of 50% is fair and reasonable under all of the circumstances, and the Court finds that such royalty is necessary and sufficient to prevent undue enrichment of Lessee-Producers". *Northern Natural Gas Co. v. Grounds*, 393 F. Supp. 949 at 991 (DC Kansas 1974) (J.A. A119).

The Court of Appeals has now reversed this holding, and held that royalty is to be paid in accordance with the terms of the oil and gas leases and other applicable instruments. This royalty is usually one-eighth. *Northern Natural Gas Co. v. Grounds*, 666 F.2d 1279 at 1286 (10th Cir. 1981). (J.A. A16). It is this holding which the petitioner landowners ask this Court to review and reverse.

The Court of Appeals had previously made an identical holding in the related case of *Ashland Oil Inc. v. Phillips Petroleum Co. v. United States*, 554 F.2d 381 (10th Cir. 1977), *cert. denied*, 434 U.S. 921,968 (1977). (J.A. A429). (hereinafter *Ashland I*). The Court there said concerning a like 50-50 split which had been decreed by the District Court for the Northern District of Oklahoma,

> Our opinion in the *Consolidated Helium Cases* [*Grounds I*] requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment

> of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

Id. at 392. (J.A. A454).

True it is that no landowners were parties to Ashland I, but this holding was by the Court *en banc* after a consolidated hearing of *Ashland I* and these *Grounds II* cases at which petitioners had the opportunity to, and did, present their arguments that they are entitled to more royalty than is provided for in the leases.

They had still another opportunity, of which they also took advantage, when the Court of Appeals set these cases for a second hearing and argument after *Ashland* became final.

ARGUMENT

In seeking review and reversal of the holding that the rate of royalty is governed by the lease provisions, petitioner landowners make two basic arguments.

The first is that this holding "has ignored, if not defied" this Court's holding in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974), which petitioners construe to require the application of state law, not federal law, to this issue. *Texaco*, of course, dealt only with the question of federal district court jurisdiction and had nothing to do with any landowner claims, only that of a lessee-producer. But more importantly the Court of Ap-

peals did apply state law in determining the question of lease coverage of commingled helium. Its review of the law of Kansas, Texas and Oklahoma in *Grounds I* occupies six pages of the Federal Reporter, 441 F.2d 710-715, and eleven pages of the Joint Appendix, (A143-A153). It is upon such review that the Court holds that "in the three states intent is a question of fact", 441 F.2d at 713 (J.A. at A150), and concludes that there was no intent to exclude commingled helium from the coverage of the leases. Thus petitioners' argument that *Texaco* requires the application of state law is beside the point. State law was applied.

The second argument is that this question was decided in *Ashland I* and that no landowners were parties to that case. But the question was decided in *Grounds I* to which petitioners were parties and in which and these *Grounds II* cases have had three hearings of their contentions, one of which was before the Court *en banc*. Nothing in the law entitles them to still a fourth hearing.

CONCLUSION

The petition is frivolous and should be denied.

Respectfully submitted,

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May 1982

Appendix

APPENDIX

List of affiliates and subsidiaries of Gulf Oil Corporation which are not wholly owned:

A/S Jargul

A/S Jargul and Co. K/S

AB Djurgardsberg

Adela Investment Company, S.A.

Albert Rose Chemicals, Ltd.

Allied — General Nuclear Services

Andogas S.A. (Switzerland)

Asia Polymer Corp.

Autobahn — Raststaette Wuerenlos Ag

Aviation Fueling Services — GT&T
International Aviation Sales

Bryce & Co. Pty. Ltd.

China Gulf Oil Company Limited

China Gulf Plastics Corporation

Chinhae Chemical Company, Ltd.

Colonial Pipeline Company

Compagnie D'Investissement
Bustibles De Reacteurs A Haute Tp

"Condor" Industria Quimica, S.A.

Delaware Bay Transportation Company

Det Gronlandske Olieaktieselskab

Dixie Pipeline Company

Ethyleen Pijpleiding Maatschappij (Belgium) S.A.

Ethyleen Pijpleiding Maatschappij (Nederland) B.V.

Explorer Pipeline Company

General Atomic Company (Partnership)

Gulf Canada Limited

Gulf Oil Zaire S.A.R.L.

Harshaw — Murata Kabushika Kaisha

Harshaw — Juarez S.A. De C.V.

Harshaw Galvanotecnia

Harshaw Quimica Ltda.

Hochtemperatur Reaktorbau GMBH

Kuwait Oil Company Limited

Laurel Pipe Line Company

London Oil Refining Company Limited

Mid-Valley Pipeline Company

Midwest Carbide Corporation

Oil Shippers Service, Inc.

Oklahoma Nitrogen Company (Partnership)

Paloma Pipe Line Company

Pembroke Capital Company

Pembroke Cracking Company

Plastigama, S.A.

Platte Pipeline Company

Pol Transport AB

Polyquimicos, S.A.

Raffinerie De Cressier S.A.

Resinas Andinas S.A.

Rio Blanco Oil Shale Partnership

Sarni S.P.A. — Refining

Societe De Combustible Pour Reacteurs
A Haute Temperature (Corhat)

Solvent Refined Coal International, Inc.

Sunrise International Company Limited

Svensk Petroleum Administration A.B.

Svensk Petroleum Largring Tre A.B.

Svenska Petroleum Forvalting A.B.

Taita Chemical Corporation

Taiwan Plasticizer Corporation

Taiwan VCM Industries Corp.

Venezuela Gulf Refining Company

West Texas Gulf Pipe Line Company

Opposition

3

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CLERK

Nos. 81-1919, 81-1920, 81-1921 and 81-1922

In the Supreme Court of the United States

October Term, 1981

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QUESTIONS PRESENTED

I

Whether this Court can reexamine the liability questions previously involved where such issues have been resolved and have been final for more than eleven years, and where this Court has denied certiorari on three previous occasions in which it was held that these respondents are entitled to recover the reasonable wellhead value of commingled helium.

II

Whether the court of appeals accorded petitioners a full and fair hearing, thereby satisfying the requirements of the Fifth Amendment to the Constitution of the United States, whereby that court in a consolidated hearing permitted all parties herein to participate, both through oral presentations and written briefs, and thereafter applied principles of law to the petitioners herein.

III

Whether the court of appeals accorded the petitioners herein a full and fair hearing, thereby satisfying the requirements of the Fifth Amendment to the Constitution of the United States, where subsequent to a consolidated hearing that court granted another hearing which provided for each party herein to again orally argue and file supplemental briefs.

LIST OF COMPANIES AS REQUIRED BY RULE 28.1 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The parents, subsidiaries and affiliates of respondents, Mobil Oil Corporation, Mapco Production Company, The Superior Oil Company and Diamond Shamrock Corporation, are set forth in a separate Joint Supplemental Appendix A attached hereto.

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deprived of their contract rights and these errors must be corrected. Petitioners have further been improperly deprived of the benefit of the admissions and confessions of judgment of Phillips Petroleum Company. The Court has imposed a penalty on Panhandle's production and exchange contracts which is totally contrary to its rationale for relief given to the lessees-producers and royalty owners. The Court has improperly applied the "law of the case" of another case to this case. The Court has created a contract for the benefit of third parties where none existed. For all of the reasons stated herein, it is respectfully requested that a rehearing en banc be granted to petitioners in accordance with the matters discussed in this motion.

Respectfully submitted,

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Gary W. Davis, One of the Attorneys for Petitioners Panhandle Eastern Pipe Line Company and National Helium Corporation

APPENDIX GG

Constitutional and Statutory Provisions Involved:

1. Fifth Amendment to the Constitution of the United States

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. §§ 1(b) and 4(c) of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. §§ 717(b) and 717(c)

NATURAL GAS ACT

(15 U.S.C. § 717 et al)

Section 1 (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

§ 4(c) of the Natural Gas Act, 52 Stat. 822, 15 U.S.C. § 717(c)

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

3. Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. §§ 167-167n

Public Law 86-777

AN ACT

To amend the Helium Act of March 3, 1925, as amended, for the defense, security, and the general welfare of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Helium Act Amendments of 1960."

SEC. 2. The Act entitled "An Act authorizing the conservation, production, and exploitation of helium gas, a mineral resource pertaining to the national defense, and to the development of commercial aeronautics, and for other purposes", approved March 3, 1925 (43 Stat. 1110), as amended, is amended to read as follows:

"That this Act may be cited as the 'Helium Act'.

"SEC. 2. As used in this Act:

"(1) The term 'Secretary' means the Secretary of the Interior;

"(2) The term 'person' means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, or State or political subdivision thereof; and

"(3) The terms 'helium-bearing natural gas' and 'helium-gas mixture' mean, respectively, natural gas and gas mixtures containing three-tenths of 1 per centum or more of helium by volume.

"SEC. 3. (a) For the purpose of conserving, producing, buying, and selling helium, the Secretary is authorized—

"(1) to acquire by purchase, lease, gift, exchange, or eminent domain, lands or interests therein or options thereon, including but not limited to sites, rights-of-way, and oil or gas leases containing obligations to pay rental in advance or damages arising out of the use and operation of such properties; but any such land or interest in lands may be acquired by eminent domain only when the Secretary determines (A) that he is unable to make a satisfactory agreement to acquire such land or interest in land, and (B) that such acquisition by eminent domain is necessary in the national interest;

"(2) to make just and reasonable contracts and agreements for the acquisition, processing, transportation, or conservation of helium, helium-bearing natural gas, or helium-gas mixtures upon such terms and conditions, and for such periods, not exceeding

twenty-five years, as may be necessary to accomplish the purposes of the Act, except that the Secretary shall not make such contracts and agreements which shall require payments by the Government in any one fiscal year aggregating more than the amount which shall be established initially in an appropriation Act and which may be increased from time to time in appropriation Acts, or if the Secretary—

> "(A) determines that the national interests require the conservation of certain helium or require certain helium-bearing natural gas or certain helium-gas mixture for the production or conservation of helium, and
>
> "(B) determines that he is unable to acquire such helium, helium-bearing natural gas, or helium-gas mixture upon reasonable terms and at the fair market value,

he is authorized to acquire by eminent domain such helium and so much of such helium-bearing natural gas or helium-gas mixture as is necessarily consumed in the extraction of such helium after removal from its place of deposit in nature and wherever found, or the temporary use of such helium-bearing natural gas or helium-gas mixture for the purpose of extracting helium, together with the appropriate interest in pipelines, equipment, installations, facilities, personal or real property, including reserves, easements or other rights necessary or incident to the acquisition of such helium, natural gas, or mixture, but the condemnation of any such helium, helium-bearing natural gas, or helium-gas mixture, shall be effected in the same manner and following the procedures established in section 8(a) of this Act, the just compensation for such condemnation to be measured by terms and prices de-

termined to be commensurate with the fair market value, and in the temporary use of any helium-bearing natural gas or helium-gas mixture for the purpose of extracting helium the Secretary shall cause no delay in the delivery of natural gas to the owner, purchaser, or purchasers thereof, except that required by the extractive processes;

"(3) to construct or acquire by purchase, lease, exchange, gift or eminent domain, plants, wells, pipelines, compressor stations, camp buildings, and other facilities, for the production, storage, purification, transportation, purchase, and sale of helium, helium-bearing natural gas, and helium-gas mixtures: and to acquire patents or rights therein and reports of experimentation and research used in connection with the properties acquired or useful in the Government's helium operations;

"(4) to dispose of, by lease or sale, property, including wells, lands, or interests therein, not valuable for helium production, and oil, gas, and byproducts, of helium operations not needed for Government use, except that property determined by the Secretary to be 'excess' within the meaning of section 3(e) of the Federal Property and Administrative Services Act of June 30, 1949 (60 Stat. 378; 40 U.S.C. 472(e)), as amended, shall be disposed of in accordance with the provisions of that Act; and to issue leases to the surface of lands or structures thereon for grazing or other purposes when the same may be done without interfering with the production of helium; and

"(5) to accept equipment, money, and other contributions from public and private sources and to prosecute projects in cooperation with other agencies, Federal, State, or private.

"(b) Any known helium-gas-bearing land on the public domain not covered at the time by leases or permits under the Mineral Lands Leasing Act of February 25, 1920, as amended, may be reserved for the purposes of this Act, and any reservation of the ownership of helium may include the right to extract, or have extracted, such helium, under such rules and regulations as may be prescribed by the Secretary, from all gas produced from lands so permitted, leased, or otherwise granted for development, except that in the extraction of helium from gas produced from such lands, it shall be extracted so as to cause no delay, except that required by the extraction process, in the delivery of gas produced from the well to the purchaser or purchasers thereof at the point of delivery specified in contracts for the purchase of such gas. If any reserved rights of ownership and extraction of helium are not exercised before production of any helium-bearing natural gas or any helium-gas mixture, the Secretary is authorized to acquire such helium in accordance with section 3(a)(2) of this Act.

"(c) All contracts and agreements made by the Secretary for the acquisition of helium from a private plant shall contain a provision precluding the plant owner from selling any helium to any purchaser other than the Secretary at a price lower than the lowest price paid by any Government agency for helium acquired from any private plant under any contract entered into pursuant to this section and outstanding at the time of such sale.

"SEC. 4. The Secretary is authorized to maintain and operate helium production and purification plants together with facilities and accessories thereto; to acquire, store, transport, sell, and conserve helium, helium-bearing natural gas, and helium-gas mixtures, to conduct exploration for

and production of helium on and from the lands acquired, leased, or reserved; and to conduct or contract with public or private parties for experimentation and research to discover helium supplies and to improve processes and methods of helium production, purification, transportation, liquefaction, storage, and utilization: *Provided, however,* That all research contracted for, sponsored, cosponsored, or authorized under authority of this Act shall be provided for in such a manner that all information, uses, products, processes, patents and other developments resulting from such research developed by Government expenditure will (with such exceptions and limitations, if any, as the Secretary may find to be necessary in the interest of national defense) be available to the general public: *And provided further,* That nothing contained herein shall be construed as to deprive the owner of any background patent relating thereto to such rights as he may have thereunder.

"SEC. 5 (a) Whenever the President determines that the defense security, and general welfare of the United States requires such action, the Secretary shall issue such regulations as he deems necessary for the licensing of sales and transportation of helium in interstate commerce after extraction from helium-bearing natural gas or helium-gas mixtures. Thereafter it shall be unlawful for any person to sell or transfer helium in interstate commerce except in accordance with such regulations or pursuant to the terms of a license issued by the Secretary, or in accordance with the terms of a contract or agreement with the Secretary entered into pursuant to this Act. For the purpose of this section, the term 'helium' shall mean helium, after extraction from helium-bearing natural gas or helium-gas mixtures, in a refined or semirefined state suitable for use.

"(b) Each license shall be issued for a specified period to be determined by the Secretary, but not exceeding five

years, and may be renewed by the Secretary upon the expiration of such period. No such license shall be issued to a person if in the opinion of the Secretary the issuance of a license to such person would be inimical to the defense and security of the United States. No such license shall be assigned or otherwise transferred directly or indirectly except with the consent or approval of the Secretary in writing. Any such license may be revoked for any material false statement in the application for license, or for violation or a failure to comply with the terms and provisions of this Act, the regulations issued by the Secretary pursuant thereto, or the terms of the license.

"(c) In issuing licenses under this section, the Secretary shall impose such regulations and terms of licenses as will permit him effectively to promote the common defense and security as well as the general welfare of the United States. The licensing authority herein granted shall be used solely for the purpose of preventing the transportation or sale of helium for end uses determined by the Secretary to be nonessential or wasteful, and any determination that any end use is nonessential or wasteful shall be published in the form of general regulations applicable to all transportation or sales of helium.

"(d) Whenever Congress or the President declares that a war or national emergency exists, the Secretary is authorized to suspend any license granted under this Act if in his judgment such suspension is necessary to the defense and security of the United States, and he is further authorized to take such steps as may be necessary to recapture or reacquire supplies of helium.

"SEC. 6. (a) The Department of Defense, the Atomic Energy Commission, and other agencies of the Federal Government, to the extent that supplies are readily avail-

able, shall purchase all major requirements of helium from the Secretary.

"(b) The Secretary is authorized to sell helium for Federal, medical, scientific, and commercial uses in such quantities and under such terms and conditions as he determines.

"(c) Sales of helium by the Secretary shall be at prices established by him which shall be adequate to cover all costs incurred in carrying out the provisions of this Act and to repay to the United States by deposit in the Treasury, together with interest as provided in subsection (d) of this section, the following:

"(1) Within twenty-five years from the date of enactment of the Helium Act Amendments of 1960, the net capital and retained earnings of the helium production fund (established under section 3 of this Act prior to amendment by the Helium Act Amendments of 1960), determined by the Secretary as of such date of enactment, plus any moneys expended thereafter by the Department of the Interior from funds provided in the Supplemental Appropriation Act, 1959, for construction of a helium plant at Keyes, Oklahoma;

"(2) Within twenty-five years from the date of borrowing, all funds borrowed, as provided in section 12 of this Act, to acquire and construct helium plants and facilities; and

"(3) Within twenty-five years from the date of enactment of the Helium Act Amendments of 1960, unless the Secretary determines that said period should be extended for not more than ten years, all funds borrowed, as provided in section 12 of this Act, for all purposes other than those specified in clause (2) above.

"(d) Compound interest on the amount specified in clauses (1), (2), and (3) of subsection (c) which have not been paid to the Treasury shall be calculated annually at rates determined by the Secretary of the Treasury taking into consideration the current average market yields of outstanding marketable obligations of the United States having maturities comparable to the investments authorized by this Act, except that the interest rate on the amounts specified in clause (1) of subsection (c) shall be determined as of the date of enactment of the Helium Act Amendments of 1960, and the interest rate on the obligations specified in clauses (2) and (3) of subsection (c) as of the time of each borrowing.

"(e) Helium shall be sold for medical purposes at prices which will permit its general use therefor; and all sales of helium to non-Federal purchasers shall be upon condition that the Federal Government shall have a right to repurchase helium so sold that has not been lost or dissipated, when needed for Government use, under terms and at prices established by regulations.

"(f) All moneys received under this Act, including moneys from sale of helium or other products resulting from helium operations and from the sale of excess property shall be credited to the helium production fund, which shall be available without fiscal year limitation, for carrying out the provisions of this Act, including any research relating to helium carried out by the Department of the Interior. Amounts accumulating in said fund in excess of amounts the Secretary deems necessary to carry out this Act and contracts negotiated hereunder shall be paid to the Treasury and credited against the amounts required to be repaid to the Treasury under subsection (c) of this section.

"SEC. 7. The Secretary of Defense and the Chairman of the Atomic Energy Commission may each designate representatives to cooperate with the Secretary in carrying out the purposes of this Act, and shall have complete right of access to plants, data, and accounts.

"SEC. 8. (a) Proceedings for the condemnation of any property under section 3 of this Act shall be instituted and maintained pursuant to the provisions of the Act of August 1, 1888 (25 Stat. 357; 40 U.S.C. 257), as amended, and sections 1358 and 1403 of title 28 of the United States Code, or any other Federal statute applicable to the acquisition of real property by eminent domain. The Acts of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a-58e), and October 21, 1942 (56 Stat. 797; 40 U.S.C. 258f), shall be applicable to any such proceedings. Wherever the words 'real property', 'realty', 'land', 'easement', 'right-of-way', or words of similar meaning, are used in such code provisions or Acts relating to procedure, jurisdiction, and venue, they shall be deemed, for the purposes of this Act, to include any personal property authorized to be acquired hereunder.

"(b) In the event of disposal under section 3(a)(4) of this Act of any property acquired by eminent domain pursuant to this Act, the former owner or successor interest of the rights therein shall have the preferential right to reacquire such property on terms as favorable as those terms whereby disposition may be made under such section.

"SEC. 9. The Secretary is hereby authorized to establish and promulgate such rules and regulations, as are consistent with the directions of this Act and are necessary to carry out the provisions hereof.

"SEC. 10. (a) The provisions of the Administrative Procedure Act of June 11, 1946 (60 Stat. 637; 5 U.S.C.

1001-1011), as amended, shall apply to any agency proceeding and any agency action taken under this Act, including the issuance of rules and regulations, and the terms 'agency proceeding' and 'agency action' shall have the meaning specified in the Administrative Procedure Act.

"(b) In any proceeding under this Act for the granting, suspending, revoking, or amending of any license, or application to transfer control thereof, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, the Secretary shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. Any final order entered in any such proceedings shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950 (64 Stat. 1129; 5 U.S.C. 1031-1042), as amended, and to the provisions of section 10 of the Administrative Procedure Act.

"SEC. 11. The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing,

compression, transportation or storage divided and allocated to helium on a volumetric basis.

"SEC. 12. (a) The Secretary is authorized to borrow annually from the Treasury and credit to the fund established under section 6(f) of this Act such amounts as may be authorized in the initial appropriation Act and which may be increased from time to time in appropriation Acts and as are necessary to carry out the provisions of this Act and contractual obligations hereunder.

"(b) For the purpose of this section the Secretary may issue to the Secretary of the Treasury notes, debentures, bonds, or other obligations to be redeemable at the option of the Secretary before maturity in such manner as may be stipulated in such obligations. The Secretary of the Treasury is authorized and directed to purchase any obligations issued by the Secretary under authority of this section and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under the Second Liberty Bond Act, as amended, are extended to include any purchases of obligations of the Secretary hereunder.

"SEC. 13. Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this Act or any regulation or order issued or any terms of a license granted thereunder shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation, shall upon conviction thereof, be punished by a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both.

"SEC. 14. Whenever in the judgment of the Secretary any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this Act, or any regulation or order issued or any term of a license granted thereunder, any such act or practice may be enjoined by any district court having jurisdiction of such person, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

"SEC. 15. It is the sense of the Congress that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits, through the administration of this Act, a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Governmental activities.

"SEC. 16. The Secretary of the Interior is directed to report annually to the Congress on matters contained in this Act.

"SEC. 17. If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

SEC. 3. The amendment made by this Act shall become effective on March 1, 1961.

Approved September 13, 1960.

4. Rule 52 of Federal Rules of Civil Procedure

Rule 52.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). (Emphasis supplied)

APPENDIX HH

Petition to Rescind Order Dated May 11, 1981 and for Stay Order, Filed May 26, 1981

(Filed May 26, 1981)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 74-1886 thru 74-1894
75-1014 thru 75-1035
75-1051 thru 75-1061

(Consolidated Helium Cases II)

No. 81-1159

NORTHERN NATURAL GAS COMPANY, et al.,
(Helex Group)

vs.

RALPH GROUNDS, et al.,
(Landowner Group)

and

SOCONY MOBIL OIL CO., et al.,
(Lessee-Producer Group)

ASHLAND OIL, INC.,
Plaintiff-Appellant,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee,

and

UNITED STATES OF AMERICA,
Intervenor-Defendant.

PETITION TO RESCIND ORDER DATED MAY 11, 1981 AND FOR STAY ORDER

TO: Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

Petitioners, consisting of the Helex Group, request the Court to rescind its Order dated May 11, 1981, wherein the Court (a) informed the parties that *Consolidated Helium Cases II* had been abated since the appeals had been briefed, argued and submitted in November, 1976 to the Court en banc (under a procedural order dated February 5, 1976); (b) terminated the en banc status, and ordered that such cases be submitted to a three-judge panel for disposition, with argument to be held in August, 1981, not however allowing reargument on the merits; and, (c) ordered consolidation for hearing with *Ashland Oil, Inc.*, No. 81-1159.

In support of said Petition, Petitioners state:

1) An Order was entered by this Court on February 5, 1976, assigning *Consolidated Helium Cases II* to an en banc Court, and consolidating the hearing on appeal with the rehearing in *Ashland Oil, Inc.*, (Docket Nos. 73-1797, 73-1798, 73-1799) "due to the fact that there are common issues" in the two hearings. Thereafter such cases were briefed and argued to the en banc Court and submitted to that Court for decision on November 17, 1976. Since that date, *Ashland Oil, Inc.* has been reversed, retried, affirmed on appeal, and is now back before this Court on an extremely limited third appeal (Docket No. 81-1159). However, since that date, the parties in *Consolidated Helium Cases II* have awaited decision in those cases, without any advice

from the Court as to their substantive or procedural disposition.

2) The issues in *Consolidated Helium Cases II* and *Ashland Oil, Inc.*, are not common and the consolidated appeals hearing contemplated by the Court's Order will be unmanageable because the Petitioners will be required again to demonstrate, as they did in 1976, that the two cases are wholly dissimilar. As the parties in *Ashland Oil, Inc.*, from time to time have had cause to lament, the record in that case and the valuation methods considered by the trial court are extremely limited, whereas in *Consolidated Helium Cases II*, the record is comprehensive, the findings of the Court well supported by the evidence, and the findings and judgment legally unassailable and controlled on appeal by the dictates of Rule 52. The cases are different, present different issues, and clearly require different treatment on appeal. They should not be consolidated.

3) To dissolve the en banc Court four and one-half years after submission and to reassign *Consolidated Helium Cases II* to a panel of this Court, constitutes such a distortion of fair play as to be tantamount to a denial of due process in violation of the Fifth Amendment to the Constitution of the United States. These Petitioners are entitled to the procedural mechanism established by the February 5, 1976 Order, and to the en banc disposition of these appeals by the en banc Court to which they were submitted. No reason is shown to justify the termination of the en banc Court.

4) For the Court to proceed as indicated in its Order would be to invite the possibility of assignment of these appeals to a panel whose views are not consistent with the en banc Court to whom the case has been submitted.

The public perception, whether justified or not, of lack of fair play would be inimical to proper judicial administration. The May 11 Order is not merely procedural in nature, but actually affects the substantive rights of the parties. Such rights will be irreparably injured if such Order is not promptly rescinded.

WHEREFORE, Petitioners request that this Petition be considered and ruled upon with all reasonable dispatch and said matter be stayed from further proceedings until Petitioners' right to the en banc Court has been fully adjudicated.

Respectfully submitted,

Northern Natural Gas Company
Northern Helex Company
Northern Gas Products Company,
Cities Service Cryogenics, Inc.
Cities Service Helex, Inc.
National Helium Corporation
Panhandle Eastern Pipe Line Company

THE HELEX GROUP

By /s/ Mark H. Adams
Mark H. Adams, II
ADAMS, JONES, ROBINSON AND MALONE, CHARTERED
201 North Main
Post Office Box 1034
Wichita, Kansas 67201
316/265-8591
One of the Counsel for the Helex Group

APPENDIX II

Motion of Helex Companies for Enlargement of Procedural Order Entered February 5, 1976

IN THE UNITED STATES COURT OF APPEALS
Tenth Circuit

Nos. 73-1797
73-1798
73-1799

ASHLAND OIL, INC.
Plaintiff-Appellee and Appellant

vs.

PHILLIPS PETROLEUM COMPANY
Defendant-Appellant

and

UNITED STATES OF AMERICA
Intervenor-Appellant

Nos. 74-1886 thru 74-1894
75-1014 thru 75-1035
75-1051 thru 75-1061

(Consolidated Helium Cases II)

NORTHERN NATURAL GAS COMPANY,
et al, (Helex Group)
(Helex Group)

vs.

RALPH GROUNDS, et al,
(Landowner Group)

and

SOCONY MOBIL OIL CO., et al,
(Lessee-Producer Group)

MOTION OF HELEX COMPANIES FOR ENLARGEMENT OF PROCEDURAL ORDER ENTERED FEBRUARY 5, 1976

COME NOW the Helex Companies and move the Court for an Order directing the Clerk of the District Court to:

(1) Cause the Helex Companies, at their expense, to have reproduced ten (10) copies of the transcript of the testimony in the Trial Court at the trial on remand, and certify and transmit the same to the Clerk of this Court, so that a copy of the transcript of testimony is available for each member of the full panel.

(2) Certify and transmit the Pretrial Order, Memorandum Opinion, Judgment of the Trial Court, and Order overruling post trial motions.

(3) Transmit all exhibits of all parties introduced at the trial on remand to the Clerk of this Court, the same to be done immediately after all parties have filed their respective briefs. The Helex Companies hereby offer to pay the expense of such transmission and subsequent return of such exhibits to the Clerk of the District Court. The Helex Companies suggest that numbering and indexing such exhibits, as contemplated by Rule 11 (b) of the Rules of Appellate Procedure, is unnecessary, it being sufficient merely to have exhibits readily available for examination by any judge in connection with study of the transcript of the testimony.

In addition to the foregoing, if the Court requests, the Helex Companies hereby offer to pay the expense of again transmitting the original Phase I record to the Clerk of this Court and the expense of its subsequent return to the Clerk of the District Court.

The Helex Companies have been authorized to represent that the United States of America has no objection to this motion being granted.

/s/ (Illegible)
of Counsel for Helex Companies

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this day to all counsel of record.

DATED this 30th day of August, 1976.

/s/ (Illegible)
of Counsel for Helex Companies

APPENDIX JJ

Withdrawn Opinion of the United States Court of Appeals for the Tenth Circuit, Ashland Oil, Inc. v. Phillips Petroleum Company

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1797, 73-1798, 73-1799

ASHLAND OIL, INC.,
Appellee, Cross-Appellant,

v.

PHILLIPS PETROLEUM COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA,
Intervenor-Appellant.

Appeal From The United States District Court
For The Northern District of Oklahoma
(D.C. # 67-C-238)

Richard B. McDermott, Tulsa, Oklahoma (Lloyd G. Minter and Don L. Jemison, Bartlesville, Oklahoma, with him on the Brief), for Appellant.

Gerald Sawatzky, Wichita, Kansas (Stanley G. Andeel and Charles E. Cole, Jr., Wichita, Kansas, Jay W. Elston, Houston, Texas, John M. Imel, Tulsa, Oklahoma, Arloe W. Mayne, Ashland, Kentucky, J. M. O'Loughlin, Houston, Texas; Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, Fulbright & Crooker, Houston,

Texas, and Martin, Logan, Moyers, Martin & Conway, Tulsa, Oklahoma, of Counsel, with him on the Brief), for Appellee.

Jacques B. Gelin, Attorney, Department of Justice, Washington, D.C. (Wallace H. Johnson, Assistant Attorney General, Nathan G. Graham, United States Attorney, Hubert A. Marlow, Assistant United States Attorney, Edmund B. Clark, Floyd L. France, and Dennis A. Dutterer, Attorneys, Department of Justice, with him on the Brief), for Intervenor-Appellant.

Before BREITENSTEIN, SETH and DOYLE, Circuit Judges.

SETH, Circuit Judge.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted therefrom and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court, and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in the several opinions hereinafter cited. It is, however,

necessary to describe the contractual relationship which existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. §§ 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability of the Bureau to then ascertain the identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

By the contract with defendant Phillips the helium was physically acquired, but the ownership and compensation problems were put off to another day. The Bureau

thus used by this contract the advantageous position of one in possession; postponed the inevitable legal problems, and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as the sales price; further, in paragraph 7.4 it was provided that in addition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein. It provided that such payments to qualify would have to be made with the consent of the buyer, and that "consent" included claims that ". . . have been judicially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the contract formula the defendant would pay the first $3.00 per Mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States.

It is obvious that litigation such as this wherein compensation is demanded by the interest owners of the helium was contemplated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part considered in the *Consolidated Helium Cases* (Northern Natural Gas

Co. v. Grounds, 441 F.2d 704 (10th Cir.)). The basic legal relationships among the landowners, producers, and gas purchasers were established, as was the relationship of the Natural Gas Act and the Helium Act. The problem of reasonable compensation, and who should pay, was not decided and was remanded to the trial court. These were decided under federal law in a federal interpleader action.

When the matter of compensation is in issue we are faced with a different segment of the physical and legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract arrangement all become important. The relationship of the contracting parties to those who now have been determined to own interests in the helium, and the values of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United States" attached. This motion was granted. The complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium sold to the United States under the contract referred to. The Government further alleges that Ashland has already been

paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal." The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnify Phillips for additional payments . . ." The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint. Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be changed to Ashland Oil and refining Company, Plaintiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request, it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, objected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought against the defendant Phillips to recover the reasonable wellhead value of helium commingled with the FPC jurisdictional gas, but separated at defendant's plants constructed pursuant to the Helium Act and delivered to the Bureau of Mines. The contract between the defendant and the Bureau of Mines is considered above. The suit was tried

within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases*, or *Grounds*).

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds*, there considered and rejected. It would serve no purpose to again treat these arguments in this opinion. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

The *Grounds* case was remanded for a determination of the reasonable value of the helium in issue, the other points having been decided, and the basic legal relationships determined. Thus here we are faced with the value problem, and some related issues which have not come from the remanded case but from another direction.

It must be accepted that the "value" sought to be determined in this suit is a factual matter arrived at through the application of the proper legal doctrines. The appellants do not attempt to separate the factual issues from the legal issues in the application of Rule 52.

The appellants urge as a basic error on the part of the trial court that it chose the wrong method in arriving at a valuation. The defendants put on extensive testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component on a market value theory. These events covered a broad time and geographical space, and involved both governmental agencies and private parties. The trial court held that there was no free competitive market, and inferentially held that these transactions were of no probative value because they were not comparable. Instead the trial court used a different valuation method—a value less expense of beneficiation.

The appellants urge that the use of such a value less expense method was error in the face of their market value evidence. The Government on this point cites a number of condemnation cases, including United States v. Miller, 317 U.S. 369; United States v. Sowards, 370 F.2d 87 (10th Cir.); and United States v. Featherston, 325 F.2d 539 (10th Cir.). The record discloses that the rejection by the trial court of the evidence of "sales" was well within its discretion. As indicated above, the transactions which had an arguable similarity were very remote in time or place, and those closer in time and space had little or no similarity. As a matter of law, the trial court was within its discretion, in view of the evidence before it, in selecting the value less expense formula as a secondary method. There was ample evidence before it on the elements of the method.

The appellants also argue that the value less expense method was improperly applied in that the proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the several factors or elements of the method of valuation.

As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no substantial contrary evidence presented at trial although on appeal appellants assert deficiencies in the method. This was a factual determination and there was substantial evidence to support the trial court's findings although we might not have reached the same result.

The appellants also object to the allowance made by the trial court of $2.00 per Mcf for the "treatment" of the "crude" helium sold to it by Phillips, but to be incurred by the Government before resale by it, as insufficient in that it did not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The use of the deduction was proper and appellants have not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the "value" element of the value less expense method. This figure was testified to by the witness for the plaintiffs, and the amount is well within the Bureau of Mines Yearbook figures for the several years in issue. The evidence supports this figure also, and this price issue was not directly met by defendant by way of proof.

The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program—The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point and United States v. Fuller, 409 U.S. 488, which in turn cited United States v. Cors, 337 U.S. 325. This again concerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by

the Government and by private concerns. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court, on the basis of extensive testimony, and also on exhibits consisting of letters from Phillips, allocated part of the plant expense to these liquids as by-products. The evidence is clear that an increase in the production of liquids would result from the helium plant operation. This would be an increase over what had been experienced before and over ordinary extraction plants. The witnesses calculated the amount to be so used in the formula. This was not contradicted in amount by appellants, as instead they maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extraction. The record shows that increased quantities of wet gas were directed to at least one of the plants and this could make a difference in the production of liquids, but no figures were produced by defendants. Instead the defendants maintained in the face of overwhelming evidence to the contrary that the helium extraction made no difference. Under this state of the record, we must hold that the trial court was justified in using the figures it did as they were supported by substantial evidence. Different quantities of liquids were produced at different plants, and this resulted in different helium values at different plants. This, in view of the evidence, was a consequence of the application of the expense element in the formula. Evidence on this issue was presented by the parties as indicated above, and although the result

may not have been as precise as it could have been, it is again a factor supported by substantial evidence.

The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base price for the helium-nitrogen mixture it was buying from Phillips under its contract. This is the consequence of the decision, but there is no reason why the wellhead price should be determined by the contract price. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences flowing from the contract including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. The Government agreed basically to pay Phillips for its interest in the helium and then to pay more if other interest owners established their claims. Thus the price "paid" for all the interests in the helium has not yet been determined. The considerations leading to this method were described above. The value here sought to be established is independent of the contract base amount and covers all interests of the proper parties.

We have considered Lippert v. Angle, 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof. The case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also* Greenshields v. Warren Petroleum Corp., 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal question case, relying on our opinion in Texaco Inc. v.

Phillips Petroleum Co., 481 F.2d 70 (10th Cir.), which was thereafter reversed by the Supreme Court in Phillips Petroleum Co. v. Texaco Inc., 415 U.S. 125.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all important issues. No relief was sought by Ashland directly against the United States. The trial court found the elements of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was considered in the *Consolidated Helium Cases*, and the arguments were rejected.

As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is apparent that under the contractual arrangement, the United States is to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natural gas. Thus the United States is liable for the additional amounts which Phillips will have to pay by reason of this action. The Government has here entered the litigation to assert its own position and interest. This is initially a matter of dollars, but the Government still has possession of a

large part of the helium in question, and this possession can put a somewhat different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie v. Tompkins*. This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.), and by the record here, the Government is ultimately faced with claims made by many thousands of interest owners from many states relating to production from Kansas, Oklahoma, and Texas. Each state has different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in Clearfield Trust Co. v. United States, 318 U.S. 363, is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. Tompkins does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government check, and a delay in notice by the Government to the bank beyond the period contemplated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the laws of any state. In the matter before us, the helium was acquired by the United States by contracts as authorized by federal statutes. This contracting with private enterprise was suggested by statute. As stated by the Court in the cited case, "The desirability of a uniform rule is plain." *See also* National Metropolitan Bank v. United States, 323 U.S. 454, limited by Bank of America v. Parnell, 352 U.S. 29. The War Bond cases in state and federal courts lead to the same result. *See* In re Stanley's Estate, 80 P.2d 352 (Colo.). The Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, also indicated a considerable area to be omitted from the application of *Erie*. There an action by the FDIC was brought on a note given to a bank by the defendant, and the Court applied federal law. Also in the shareholders' liability action in Holmberg v. Armbrecht, 327 U.S. 392, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv. L. Rev. 976, and 105 U.Pa. L.Rev. 797.

Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out

its program, it has been held that federal law may be applied. The federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366. *See also* United States v. Allegheny County, 322 U.S. 174. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In United States v. Standard Oil Co., 332 U.S. 301, the Court stated that the interests of the Government and its legal relationships may be so determined. The impact of the application of state law upon the governmental interests is a factor of great weight. *See* United States v. Mitchell, 402 U.S. 190.

The Court in United States v. Little Lake Misere Land Co., 412 U.S. 580, considered the application of a Louisiana statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a "choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that purpose.' " [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States v. Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests, and said: "The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was effective. In so doing it set up the contractual walls between itself and the landowners and gas producers, and put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and looking at the substance, the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the Clearfield doctrine, the trial court was correct in not applying *Erie v. Tompkins*.

We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This determination prevails. The trial court, as to the interest of the landowners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

The issue of limitations has been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitation have come into play. *See* deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir.). We must conclude that this action has not been barred. American Pipe & Construction Co. v. Utah, 414 U.S. 538.

The trial court acted within its discretion under federal law in the allowance of prejudgment interest. Royal Indemnity Co. v. United States, 313 U.S. 289; St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (10th Cir.).

As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, a Miller Act case. The opinion includes a direct and intensive consideration of attorney fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'"

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co.*

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the value of the helium, as above indicated. The judgment is AFFIRMED in all other respects.

APPENDIX KK

Gas Purchase Contract Executed by Panhandle Eastern Pipe Line Company

1. Contract No. 152-3/24/60 - Cities Service Petroleum

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GAS PURCHASE AND SALES AGREEMENT
between
CITIES SERVICE OIL COMPANY
"Seller"
and
PANHANDLE EASTERN PIPE LINE COMPANY
"Buyer"

DATED: March 24, 1960

TEXAS COUNTY, OKLAHOMA

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(c) All gas that Seller may require for cycling, repressuring, pressure maintenance and gas lift operations with respect to oil reservoirs at all depths underlying the contract acreage; provided, however, gas used in such operations shall be saved by Seller (to the extent that such gas can be economically saved) and delivered to Buyer in the manner that associated gas is to be delivered to Buyer under the provisions of

this Agreement; provided, further, however, if as a result of Seller's use of gas in such operations, Seller is thereby rendered unable to deliver to Buyer the quantities of gas provided in Article V of this Agreement, the term of this Agreement shall be extended as hereinafter provided in Article IV.

(*d*) All gas which may be required for delivery to Seller's lessors under the terms of existing leases covering the lands described in Exhibit "A", including but not limited to fuel to operate a water pump for irrigation purposes on the contract acreage.

(*e*) All liquid or liquefiable hydrocarbons, oil or condensate removed by Seller from the gas produced from the contract acreage prior to delivery to Buyer. With respect to the removal of such liquid hydrocarbons at the wellhead, Seller agrees to install such facilities as may be found necessary to separate crude oil, liquid hydrocarbons, and water in its liquid state from the gas so that (to the extent that same may be removed by use of such facilities) such oil, liquid hydrocarbons, and water may be kept from entering Buyer's pipe line. All oil and liquid hydrocarbons so separated on Seller's premises shall remain the property of Seller.

(*f*) The right to elect to process under the provisions of Article XII of this Agreement.

(*g*) All helium and other inert gases as are required for helium recovery operations removed from the gas by Seller by processing prior to initial delivery or at the plant site or sites specified in Article XII.

(*h*) All associated gas which, at a tank battery or batteries, is not equivalent to an average daily volume over a twelve-month period of at least 250 MCF for

each one mile of pipe line required to connect such tank battery or tank batteries to Buyer's facilities as provided in Section 2.4 hereof; provided that if at any time associated gas reserved under this Subsection (h) equals or exceeds for a period of six months an average daily

franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the state as a foreign corporation.

ARTICLE XII - PROCESSING

12.1 Seller, at its option, may elect during the first two contract years of this Agreement to extract or cause to be extracted liquefiable hydrocarbons from gas delivered to Buyer hereunder by means of processing at a plant site near Buyer's gathering system. Seller's right to process shall be governed by the following terms:

(*a*) In the event Seller elects to extract liquefiable hydrocarbons from the gas delivered to Buyer under this Agreement, Seller shall so notify Buyer in writing during the first two contract years of this Agreement. If Seller does not so notify Buyer during said first two contract years or, if Seller so notifies Buyer but fails to commence such extraction before the end of the third contract year of this Agreement, Seller's right to extract liquefiable hydrocarbons from gas delivered to Buyer hereunder shall cease. If Seller does not perform such extraction, Seller shall have no further right, title or interest in the liquefiable hydrocarbons in such gas.

(b) Gas delivered to Buyer by Seller at the delivery points specified in Article VII shall be transported in Buyer's gathering system and redelivered to Seller for processing at a mutually agreeable point in Texas County, Oklahoma, to be determined in conjunction with the design of Buyer's gathering system serving the wells located on the contract acreage; provided, however, if the parties are unable to agree upon such point, then in that event it is agreed that the redelivery point shall be at the point on Buyer's then existing gathering system in Texas County, Oklahoma, which will permit Seller to process all the gas delivered to Buyer from the contract acreage. For the purposes of this Agreement, said redelivery point shall be called "plant inlet."

(c) Buyer shall have the right to utilize its gathering system used in gathering Seller's gas, for gathering gas purchased by Buyer from others, and Buyer shall have the further right to commingle on the upstream side of the plant inlet Seller's gas with such gas purchased from others. Provided, however, neither Seller's gas nor such gas purchased from others shall be processed

for the recovery of liquefiable hydrocarbons from the time it enters Buyer's gathering system until it reaches the plant inlet.

(d) Buyer shall make available to Seller at the plant inlet a volume of gas equal to the volume of gas Seller delivers into Buyer's gathering system at the delivery points specified in Article VII, less volumes of gas attributable to line and operational losses and shrink-

age that occur in transporting such gas through Buyer's gathering system. The gas delivered to Seller at the plant inlet shall be delivered at the operating pressures that exist in the normal operation of Buyer's gathering system, and at a temperature not to exceed 130° Fahrenheit.

(*e*) Seller shall have the right to extract liquefiable hydrocarbons, other than methane, from the gas delivered to Seller at the plant inlet, together with such methane as cannot be separated from the heavier hydrocarbons recovered from such gas under the normal operation of processing facilities; provided, that Seller, by such processing, shall not reduce the total heating value of the residue gas to be delivered to Buyer below 975 BTU's per cubic foot and provided that by such processing, such residue gas will not be rendered incapable of meeting any of the quality specifications set forth in Section 13.1.

(*f*) Seller shall have the right to use a part of the gas delivered to it at the plant inlet for fuel for processing gas covered by this Agreement. All gas used for fuel shall be measured by Seller and Seller shall furnish Buyer a statement during the first 7 days of each month showing the volumes so measured during the preceding month. The accuracy of Seller's measurement of gas used for fuel shall be verified by Seller at Buyer's request in the presence of Buyer's representative.

(*g*) Seller shall deliver to Buyer all volumes of residue gas which remain after the removal of the liquefiable hydrocarbons Seller is entitled to remove from the gas delivered to Seller at the plant inlet, less volumes of gas used for fuel in such processing. Said residue gas shall be delivered to Buyer at a point on Buyer's

gathering system not more than 1,000 feet downstream from the plant inlet. For the purposes of this Agreement, said point shall be called "plant outlet." The residue gas delivered to Buyer at the plant outlet shall not contain more than 7 pounds of water vapor per 1,000 MCF and shall be delivered at temperatures less than 130° Fahrenheit.

(*h*) Seller shall be obligated to provide such compression as may be necessary to make up any pressure drop of the gas in excess of a pressure drop of 35 pounds per square inch which results from such processing between the plant inlet and plant outlet.

(*i*) Buyer shall install, maintain and operate measuring facilities necessary to measure the volumes of gas delivered to Seller at the plant inlet and the volumes of residue gas delivered to Buyer at the plant outlet. Buyer, at its option, may install, maintain, and operate recording calorimeters and gravitometers at or near said measuring facilities and the arithmetical average of the BTU and specific gravity values recorded shall be used to determine the average heating value and specific gravity of the gas flowing through the meters. Except as herein specifically provided, measurement of gas at the plant inlet and plant outlet shall be conducted as provided in Article XIV.

(*j*) Seller agrees to reimburse Buyer for the reduction in volume of the gas due to the extraction of liquefiable hydrocarbons, for gas used as fuel, and for the difference in heating value of the gas at the plant inlet and plant outlet at the prevailing contract price plus

any taxes on gas used or lost borne by Buyer pursuant to Article XI of this Agreement. The amount of such reimbursement to Buyer by Seller shall be calculated using the following formula:

Formula:

$$R = [Vi \times \frac{Hi}{1000} \times P] - [Vo \times \frac{Ho}{1000} \times P] + [T]$$

Where:

R = Total amount due Buyer by Seller in dollars.

Vi = Plant inlet volume in MCF.

Hi = Heating value of gas at plant inlet.

P = Price in effect under Article X in dollars per MCF.

Vo = Plant outlet volume in MCF.

Ho = Heating value of gas at plant outlet.

T = New or increased tax on gas used or lost in plant borne by Buyer in accordance with Article XI in dollars.

Provided, however, the volumes for which Seller is required to reimburse Buyer shall not be less than the measured gas used for fuel in said plant, plus the calculated volumes of gas attributable to the liquids removed in said plant. Seller shall furnish Buyer a statement during the first 7 days of each month showing the volume of each product extracted from the gas delivered to Seller at the plant inlet during the preceding month. Buyer shall have the right to verify

the measurement and determine the composition of liquids at Buyer's expense.

(*k*) Seller shall indemnify Buyer and hold it harmless from any and all costs or liability resulting in injuries to persons or properties due to the construction, maintenance or operation of Seller's processing facilities and related facilities and the possession of, or handling or loss of, the gas from the time it is received at the plant inlet from Buyer's gathering system until it is returned to Buyer at the plant outlet.

12.2 Other parties from whom Buyer purchases gas may have the right to extract liquefiable hydrocarbons and/or helium similar to the rights of Seller contained in Sections 12.1 and 12.3. In that event, Seller shall have the right, insofar as Buyer is concerned, to join with such other parties in the construction and operation of processing facilities to extract liquefiable hydrocarbons and/or helium.

12.3 In addition to the right to elect to extract liquefiable hydrocarbons reserved by Seller in Section 12.1 above, Seller reserves the right to extract helium and other inert gases as are required for helium recovery operations from gas produced from the contract acreage. In the event Seller is not extracting liquefiable hydrocarbons at the plant site provided in Section 12.1 by the end of the third contract year, then Seller's right to extract helium at the plant site provided for in Section 12.1 shall cease. In the event Seller is processing at the end of the third contract year at the plant site as provided for in Section 12.1, then Seller's right thereafter to extract helium shall continue so long as Seller continues to extract liquefiable hydrocarbons at such plant site; provided, however, Seller shall have the right during the term of this contract to extract helium by any means which Seller may elect prior to initial delivery of gas to Buyer. Seller will account to Buyer for

any of Buyer's gas used or consumed in the extraction of helium on the same basis as provided in Section 12.1. In the event Seller does not extract helium at the plant site or sites as provided in Section 12.1 or prior to initial delivery of gas to Buyer, Seller will release all further claim to helium contained in gas delivered to Buyer.

12.4 Seller shall not be obligated to continue to operate its plant if, in its sole judgment, such operation shall be deemed uneconomical.

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2. Contract No. 767-1/22/60 - Mobil Oil

1003

GAS PURCHASE AND SALES AGREEMENT

between

REPUBLIC NATURAL GAS COMPANY
"Seller"

and

PANHANDLE EASTERN PIPE LINE COMPANY
"Buyer"

DATED: January 22, 1960

TEXAS COUNTY, OKLAHOMA

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with respect to oil reservoirs at all depths underlying the contract acreage; provided, however, gas used in such operations shall be saved by Seller (to the extent that such gas can be economically saved) and delivered to Buyer in the manner that associated gas is to be delivered to Buyer under the provisions of this Agreement; provided, further, however, if as a result of

Seller's use of gas in such operations, Seller is thereby rendered unable to deliver to Buyer the quantities of gas provided in Article V of this Agreement, the term of this Agreement shall be extended as hereinafter provided in Article IV.

(*d*) All gas which may be required for delivery to Seller's lessors under the terms of existing leases covering the lands described in Exhibit "A", including but not limited to fuel to operate a water pump for irrigation purposes on the contract acreage.

(*e*) All liquid or liquefiable hydrocarbons, oil or condensate removed by Seller from the gas produced from the contract acreage prior to delivery to Buyer. With respect to the removal of such liquid hydrocarbons at the wellhead, Seller agrees to install such facilities as may be found necessary to separate crude oil, liquid hydrocarbons, and water in its liquid state from the gas so that (to the extent that same may be removed by use of such facilities) such oil, liquid hydrocarbons, and water may be kept from entering Buyer's pipe line. All oil and liquid hydrocarbons so separated on Seller's premises shall remain the property of Seller.

(*f*) The right to elect to process under the provisions of Article XII of this Agreement.

(*g*) All helium removed from the gas by Seller by processing prior to initial delivery or at the plant site or sites specified in Article XII.

2.2 Seller's Installation of Equipment: Seller agrees to act with due diligence to obtain and install all equipment required to effect delivery of the gas to Buyer in the manner herein set forth, including all facilities necessary

to deliver to Buyer such volumes of associated gas as Seller may elect to deliver to points on Buyer's system.

2.3 Buyer's Connection of Wells Producing Non-Associated Gas: After Buyer's and Seller's receipt of acceptable authorization to commence

franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the state as a foreign corporation.

ARTICLE XII - PROCESSING

12.1 Seller, or others permitted by Seller, shall have the right to elect during the first two contract years of this Agreement to extract liquefiable hydrocarbons, other than methane, from the gas produced from the contract acreage, together with such methane as cannot be separated from the heavier hydrocarbons recovered from the gas under normal operation of processing facilities; provided, however, that Seller by such extraction shall not reduce the total heating value of the residue gas to be delivered to Buyer below 975 BTU's per cubic foot, and provided, that by such extraction the residue gas will not be rendered incapable of meeting any of the quality specifications set forth in Section 13.1. Provided, further, in the event Seller has not commenced the extraction of such liquefiable hydrocarbons before the end of the third contract year of this Agreement, Seller's right to perform such extraction shall cease. If Seller does not elect to perform such extraction, Seller shall have no further right, title, or interest in the liquefiable hydrocarbons in such gas.

12.2 In the event Seller elects to exercise its right to extract liquefiable hydrocarbons as provided in Article

12.1, Seller shall have the right to perform such extraction by means of processing at one or more mutually agreeable plant sites in Texas County, Oklahoma located at or near Buyer's gathering system serving the wells located on the contract acreage. Such plant sites shall be located at a point or points which will permit Seller to process all the gas delivered to Buyer from the contract acreage. Buyer shall make available at Seller's plant sites the gas delivered to Buyer from the contract acreage less the volumes of that gas attributable to line and operational losses that may occur in transporting through Buyer's gathering system the gas delivered to Buyer from the contract acreage. The gas so delivered to Buyer and transported to Seller's plant sites shall be delivered by Buyer into the intake of such plant at the operating pressure and temperature that exists in the normal operation of Buyer's gathering system. Seller's right to construct such processing plant on Buyer's gathering system is conditioned as follows:

(*a*) Buyer shall install and maintain measuring equipment at the intake and outlet of Seller's processing plants. Seller agrees to reimburse Buyer for the reduction in

volume of the gas attributable to the extraction of liquefiable hydrocarbons, Buyer's gas used as fuel in Seller's plant, if any, and for the difference in the heating value of the plant inlet and outlet gas streams at the prevailing contract price, plus any tax borne by Buyer pursuant to Article XI of this Agreement. The amount of such reimbursement to Buyer by Seller shall be calculated in the manner shown in the following example:

EXAMPLE

Assumptions:

Plant intake volume	1,000 MCF
BTU of gas at plant intake	1,100 BTU per cubic foot
Plant discharge volume	900 MCF
BTU of gas at plant discharge	1,000 BTU per cubic foot

$$1{,}000 \text{ MCF} \times \frac{1{,}100 \text{ BTU}}{1{,}000 \text{ BTU}} \times \$0.17 = \$187.00$$

$$900 \text{ MCF} \times \frac{1{,}000 \text{ BTU}}{1{,}000 \text{ BTU}} \times \$0.17 = \$153.00$$

Amount due Buyer from Seller (excluding tax)	= $ 34.00
New tax borne by Buyer on gas used in plant (100 MCF x 1¢ x 75%)	= $ .75
Total Amount Due Buyer by Seller	$ 34.75

provided, however, the volumes for which Seller is required to reimburse Buyer shall not be less than the measured volumes of Buyer's gas used for fuel in said plant, plus the calculated theoretical volumes of gas attributable to the liquids removed in said plant. Buyer shall have the right, but not the obligation, to install and maintain recording gravitometers and calorimeters at or near Buyer's measuring facilities at the inlet and outlet of Seller's processing plant and the arithmetical average of the gravity and BTU values

recorded shall be used to determine the average gravity and heating value of the plant inlet and outlet streams of gas.

(*b*) Seller shall be obligated to provide such compression as may

be necessary to make up any pressure drop in excess of 35 pounds per square inch resulting from such processing.

(*c*) Seller shall return to Buyer all volumes of residue gas which remain after the removal of the liquefiable hydrocarbons Seller is entitled to remove from the gas less any volumes of Buyer's gas used for fuel in Seller's plant, which fuel is to be measured by Seller. The residue gas returned to Buyer shall not contain more than 7 pounds of water vapor per 1,000 MCF, and shall not be delivered to Buyer at a temperature in excess of 130° F.

(*d*) Seller shall indemnify Buyer and hold it harmless of any and all costs or liability resulting in injuries to persons or properties due to the construction, maintenance or operation of said processing plant and related facilities and the possession of, or handling or loss of, the gas from the time it is received at Seller's plant from Buyer's gathering system until it is returned to Buyer. The residue gas, including all substances contained therein, delivered to Buyer after processing by Seller shall be and remain the property of Buyer.

12.3 In addition to the right to elect to extract liquefiable hydrocarbons reserved by Seller in Articles 12.1 and 12.2 above, Seller reserves the right to extract helium

from gas produced from the contract acreage. In the event Seller is not extracting liquefiable hydrocarbons at one or more of the plant sites provided in Article 12.2 by the end of the third contract year, then Seller's right to extract helium at the plant site or sites provided for in Article 12.2 shall cease. In the event Seller is processing at the end of the third contract year at a plant site or sites as provided for in Article 12.2, then Seller's right thereafter to extract helium shall continue so long as Seller continues to extract liquefiable hydrocarbons at such plant site or sites; provided, however, Seller shall have the right during the term of this contract to extract helium by any means which Seller may elect prior to initial delivery of gas to Buyer. Seller will account to Buyer for any of Buyer's gas used or consumed in the extraction of helium on the same basis as provided in Article 12.2. In the event Seller does not extract helium at the plant site or sites as provided in Section 12.2 or prior to initial delivery of gas to Buyer, Seller will release all further claim to helium contained in gas delivered to Buyer.

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3. Contract No. 919-4/6/60 - Ashland Oil

1008

GAS PURCHASE AND SALES AGREEMENT

between

UNITED PRODUCING COMPANY, INC.
"Seller"

and

PANHANDLE EASTERN PIPE LINE COMPANY
"Buyer"

DATED: April 6, 1960

HASKELL and GRANT COUNTIES, KANSAS

1009

GAS PURCHASE AND SALES AGREEMENT

THIS AGREEMENT, made this 6th day of April, 1960, by and between PANHANDLE EASTERN PIPE LINE a Delaware Corporation, herein called "Buyer," and UNITED PRODUCING COMPANY, INC., a Maryland Corporation, herein called "Seller."

WITNESSETH:

WHEREAS, Seller owns or controls oil and gas leases covering the lands described in Exhibit "A", attached hereto, and

WHEREAS, Buyer owns and operates a gas pipe line system for which it desires to acquire an additional supply and reserve of gas. Buyer wishes to buy gas produced from the leases of Seller described in Exhibit "A" under the terms and provisions of this Gas Purchase and Sales Agreement, and

WHEREAS, it is the mutual desire of the parties that all of the raw gas which may be produced from certain depths under the lands and leases of Seller in Haskell and Grant Counties, Kansas, which depths and lands are described in Exhibit "A", shall be committed to Buyer during the term hereof.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

ARTICLE I - DEFINITIONS

1.1 "Gas" shall mean all gas produced from gas wells including all gases indigenous to the reservoir from which such wells are producing.

1.2 "Casinghead Gas" shall mean gas produced incidental to the production of oil from a well producing oil in commercial quantities or from a well classified as an oil well by a regulatory body having jurisdiction.

1.3 "Lease" shall mean all rights to produce oil or gas without regard to the form of instrument creating such rights.

1.4 "Contract Acreage" shall mean all acreage subject to the leases covering the lands described in Exhibit "A" attached hereto and made a part hereof and committed to this Agreement.

1.5 "Common Source of Supply" shall mean an underground reservoir containing, or appearing to contain, a common accumulation of oil or gas or both. Each zone of a general structure which is completely separated from any other zone in the structure is a "common source of supply," as used herein.

1.6 "psia" shall means pounds per square inch absolute.

1.7 "psia" shall mean pounds per square inch gauge.

1.8 "MCF" shall mean one thousand (1,000) cubic feet at a pressure of 14.65 psia and at a temperature of 60° Fahrenheit.

Meaning of symbols:

D = Deliverability, MCF per day.

R = Rate in MCF per day at which the well is producing into the pipe line at the end of a 72-hour flow period. Such flow rate will not be greater than the average flow rate during such 72-hour flow period.

Pd = Eighty per cent (80%) of the 72-hour shut-in pressure, P, in pounds per square inch absolute.

Pw, p and n = For the purposes of determining the deliverability, these terms shall have the same definitions as the corresponding terms appearing in Section 1.16, "Wellhead Open Flow Potential."

1.18 "Unit Acreage": As used in this Agreement, a well's "unit acreage" shall mean the acreage assigned to such well pursuant to regulations of regulatory authorities having jurisdiction, or, if no such regulations are established, then a well's "unit acreage" shall include the acreage properly attributed to such well for gas production purposes pursuant to the established spacing practices in the area, which acreage may be reasonably drained by such well.

ARTICLE II - COMMITMENT

2.1 Commitment: Seller hereby commits to the performance of this Agreement for the term hereof all of Seller's interest in the gas which can be commercially produced from certain depths under certain lands, which

depths and lands are described in Exhibit "A" attached hereto, and all of such gas which is attributed to said lands or Seller's interest therein as a result of the pooling or unitizing of a part of the lands described on Exhibit "A" with other lands, reserving, however, to Seller the following:

(*a*) All oil which may be produced from the contract acreage.

(*b*) All casinghead gas; provided, however, if commercial volumes of casinghead gas become available from the contract acreage, Seller shall tender such gas to Buyer in writing at the price provided in Article X and, in said tender, Seller shall agree to install and operate, at its own expense, such facilities as may be required to deliver such gas to Buyer at a central point or points on the contract acreage and at pressures sufficient for such gas to enter Buyer's gathering line. At the time said tender is made to Buyer, Seller shall furnish Buyer data that may be required to substantiate Seller's estimate of the volumes of casinghead gas that will be made available to Buyer. Buyer shall accept said tender of all casinghead gas and, within 90 days after Buyer's receipt of said tender, shall install and operate the facilities which may be required to accept deliveries of such gas at said central point or points; provided, however, Buyer shall have the right but shall not be required to install in excess of one mile of pipe line for each 500 MCF per day of casinghead gas that is available for sale to Buyer at a single central point, but in no event shall Buyer be required to accept the tender of casinghead gas at any point if the amount available for delivery to Buyer at such point

is less than 200 MCF per day. Volumes of casinghead gas which are tendered and accepted in accordance with the provisions of this Subsection (b) shall be committed to the performance of this Agreement and subject to the terms and conditions hereof insofar as they may be applicable to the production of casinghead gas. In the event Buyer elects to refuse the tender of such casinghead gas, to the extent it is entitled to so refuse, the volumes so tendered and refused shall be released from the terms of this Agreement. Seller shall have the right at any time during the term of this Agreement to process said casinghead gas for the recovery of liquefiable hydrocarbons,

other than methane, prior to the time such casinghead gas is delivered to Buyer in accordance with this Subsection (b); provided, however, that by such processing, Seller shall not reduce the total heating value of the residue casinghead gas to be delivered to Buyer below 950 BTU's per cubic foot and provided that by such processing, such residue casinghead gas shall not be rendered incapable of meeting any of the quality specifications set forth in Section 12.1.

(*c*) All gas which may be required for use as fuel by Seller for drilling and lease operations upon the contract acreage under any of the provisions hereof.

(*d*) All gas which may be required for delivery to Seller's lessors under the terms of existing oil and gas leases covering the lands described in Exhibit "A".

(*e*) All liquid hydrocarbons, oil or condensate removed by Seller by means of drips or conventional

gas-liquid separators from the gas produced from the contract acreage prior to delivery to Buyer.

(*f*) All liquefiable hydrocarbons and helium Seller removes or causes to be removed from the gas produced from the contract acreage by processing under the provisions of Article IX of this Agreement.

2.2 Seller's Installation of Equipment: Promptly after Seller has given Buyer notice that Seller has received acceptable authorization as provided in Article III hereof, Seller agrees to act with due diligence to obtain and install all equipment required to effect delivery of gas to Buyer in the manner herein set forth.

ARTICLE IX - PROCESSING

9.1 The gas received by Buyer at the delivery points specified in Article VI of this Agreement will be gathered in one or more separate gathering systems and transported in said gathering systems to Buyer's pipe lines, hereinafter called "transmission pipe lines," which are shown on Exhibit "B" attached hereto. For the purposes of this Article IX, a "gathering system" shall mean that pipe line or network of pipe lines connected to a single point on Buyer's said transmission pipe lines. It is understood and agreed that any extraction of liquefiable hydrocarbons and/or helium from the gas by Seller, as hereinafter provided, shall be conducted at a plant site or sites on said gathering systems and will be conducted prior to the time the gas covered by this Agreement enters Buyer's said transmission pipe lines. Buyer shall endeavor to design and construct said gathering systems to the end that Seller may extract

liquefiable hydrocarbons and/or helium at as few plant sites as practicable, but, Buyer shall have the right to construct said gathering systems so that it may connect the maximum number of wells with the minimum investment.

9.2 The provisions of this Section 9.2 shall apply separately to the gas produced from Seller's wells connected to a single gathering system. As used in this Section 9.2, "Base of the Chester Formation of the Mississippian System" shall mean that geological depth as shown on Exhibit "C", attached hereto which Exhibit is a portion of an electric log of the United Producing Company-E. M. Gregg #2 well located in Section 4-T29S-R34W, Haskell County, Kansas. Said log shall be used as a basis for determining the depth of the

base of the Chester Formation in wells covered by this Agreement.

(*a*) Seller, at its option, may elect during the first two contract years of this Agreement to extract or cause to be extracted liquefiable hydrocarbons and/or helium from gas delivered to Buyer hereunder by means of processing at a plant site near Buyer's gathering system. In the event Seller so elects to extract liquefiable hydrocarbons and/or helium from said gas, Seller shall so notify Buyer in writing during the first two contract years of this Agreement. If Seller does not so notify Buyer during said first two contract years or, if Seller so notifies Buyer but fails to commence such extraction before the end of the third contract year of this Agreement, Seller's right to extract liquefiable hydrocarbons and/or helium from the gas pro-

duced from wells producing from depths above the base of the Chester Formation of the Mississippian System delivered to Buyer hereunder shall cease. Seller's right to process shall be governed by the provisions of Section 9.3.

(*b*) With respect to gas produced from depths below the base of the Chester Formation of the Mississippian System, Seller, at its option, may elect during the two-year period beginning on the date of first delivery to Buyer hereunder of gas produced from such depths, to extract or cause to be extracted liquefiable hydrocarbons and/or helium from said gas. In the event Seller so elects to extract liquefiable hydrocarbons and/or helium from said gas, Seller shall so notify Buyer in writing during said two-year period. If Seller does not so notify Buyer during said two-year period or, if Seller so notifies Buyer but fails to commence such extraction before the end of the 12 months immediately following said two-year period, Seller's right to extract liquefiable hydrocarbons and/or helium from said gas delivered to Buyer hereunder shall cease. Seller's right to process shall be governed by the provisions of Section 9.3.

9.3 Seller's right to extract liquefiable hydrocarbons and/or helium as set out in Section 9.2 (a) and 9.2 (b) shall be governed by the following terms:

(*a*) Gas delivered to Buyer by Seller at the delivery points specified in Article VI shall be transported in Buyer's gathering system and redelivered to Seller for processing at a point on said gathering system to be mutually agreed upon by the parties hereto. For the purposes of this Article IX, said redelivery point shall be called

"plant inlet."

(b) Buyer shall have the right to utilize its said gathering system for gathering gas owned by Buyer or purchased by Buyer from others, and Buyer shall have the further right to commingle on the upstream side of the plant inlet Seller's gas with such gas owned by Buyer or purchased from others. Provided, however, neither Seller's gas nor such gas owned by Buyer or purchased from others shall be processed for the recovery of liquefiable hydrocarbons and/or helium from the time it enters Buyer's gathering system until it reaches the plant inlet.

(c) Buyer shall make available to Seller at the plant inlet a volume of gas equal to the volume of gas Seller delivers into Buyer's gathering system less volumes of gas attributable to line and operational losses and shrinkage that occur in transporting such gas through Buyer's gathering system. The gas delivered to Seller at the plant inlet shall be delivered at the operating pressures and temperatures that exist in the normal operation of Buyer's gathering system.

(d) Seller shall have the right to extract helium and/or liquefiable hydrocarbons, other than methane, from the gas delivered to Seller at the plant inlet, together with such methane as cannot be separated from the heavier hydrocarbons recovered from such gas under the normal operation of processing facilities; provided, that Seller, by such processing, shall not reduce the total heating value of the residue gas to be delivered to Buyer below 950 BTU's per cubic foot and provided that by such processing, such residue gas will not be rendered

incapable of meeting any of the quality specifications set forth in Section 12.1.

(*e*) Seller shall have the right to use a part of the gas delivered to it at the plant inlet for fuel for processing gas covered by this Agreement. All gas used for fuel shall be measured by Seller and Seller shall furnish Buyer a statement during the first 7 days of each month showing the volumes so measured during the preceding month.

(*f*) Seller shall deliver to Buyer all volumes of residue gas which remain after the removal of the liquefiable hydrocarbons and/or helium Seller is entitled to remove from the gas delivered to Seller at the plant inlet, less volumes of gas used for fuel in such processing. Said residue gas shall be delivered to Buyer at a point on Buyer's gathering system not more than 1,000 feet downstream from the plant inlet. For the purposes of this Agreement, said point shall be called "plant outlet." The residue gas delivered to Buyer at the plant outlet shall not contain more than 7 pounds of water vapor per 1,000 MCF and shall be delivered at temperatures less than 120° Fahrenheit.

(*g*) Seller shall be obligated to provide such compression as may be necessary to make up any pressure drop of the gas in excess of a pressure drop of 35 pounds per square inch which results from such processing between the plant inlet and plant outlet.

(*h*) Buyer shall install, maintain and operate measuring facilities necessary to measure the volumes of gas delivered to Seller at the

plant inlet and the volumes of residue gas delivered to Buyer at the plant outlet. Buyer, at its option, may install, maintain and operate recording calorimeters and gravitometers at or near said measuring facilities and the arithmetical average of the BTU and specific gravity values recorded shall be used to determine the average heating value and specific gravity of the gas flowing through the meters. Except as herein specifically provided, measurement of gas at the plant inlet and plant outlet shall be conducted as provided in Article XIII.

(i) Seller agrees to reimburse Buyer for the reduction in volume of the gas due to the extraction of liquefiable hydrocarbons and/or helium, for gas used as fuel, and for the difference in heating value of the gas at the plant inlet and plant outlet at the prevailing contract price, plus any taxes on gas used or lost in said plant which are borne by Buyer pursuant to Article XI of this Agreement. The amount of such reimbursement to Buyer by Seller shall be calculated using the following formula.

Formula:

$$R = \left[Vi \times \frac{Hi}{1000} \times P\right] - \left[Vo \times \frac{Ho}{1000} \times P\right] + [T]$$

Where:

R = Total amount due Buyer by Seller in dollars.

Vi = Plant inlet volume in MCF.

Hi = Heating value of gas at plant inlet but such heating value shall not exceed 1,200 BTU per cubic foot.

P = Price in effect under Article X in dollars per MCF.

Vo = Plant outlet volume in MCF.

Ho = Heating value of gas at plant outlet.

T = New or increased taxes on gas used or lost in said plant which are borne by Buyer in accordance with Article XI in dollars.

Provided, however, the volumes for which Seller is required to reimburse Buyer shall not be less than the measured gas used for fuel in said plant, plus the calculated volumes of gas attributable to the liquids removed in said plant.

(*j*) Seller shall indemnify Buyer and hold it harmless from any and all costs or liability resulting in injuries to persons or properties due to the construction, maintenance or operation of Seller's processing facilities and related facilities and the possession of, or handling or loss of, the gas from the time it is received at the plant inlet from Buyer's gathering system until it is returned to Buyer at the plant outlet.

9.4 Other parties from whom Buyer purchases gas (which gas is commingled with Seller's gas in Buyer's gathering system upstream from the plant inlet) may have the right to extract liquefiable hydrocarbons

and/or helium similar to the right of Seller contained in Subsections (a) and (b) of Section 9.2. In that event, Seller shall have the right, insofar as Buyer is concerned, to join with such other parties in the construction and operation of processing facilities to extract liquefiable hydrocarbons and/or helium; provided, however, this Section 9.4 shall not operate to cause Buyer to receive less residue gas or residue gas of lower quality and shall not operate to cause more expense to Buyer than would have been caused if each of such parties joining in such construction and operation would have installed processing facilities to process only its share of the gas.

ARTICLE X - PRICE

10.1 Subject to the provisions of Section 12.2 of Article XII of this Agreement, the price for all gas delivered to Buyer by Seller hereunder shall be as follows:

(*a*) Commencing with the date of first production hereunder and until five years after the first day of the month following the date of first production . . . sixteen cents (16¢) per MCF.

(*b*) At the beginning of each of the next three (3) succeeding five (5) year periods, the price shall be increased over the price for the preceding period . . . one cent (1¢) per MCF.

(*c*) The price which shall be effective during each five-year

period after the expiration of the first twenty years shall be the fair market price as mutually agreed

upon by the parties prior to the beginning of such five-year period, but, in no event, shall such price be less than . . . nineteen cents (19¢) per MCF. The fair market price shall be determined as provided in Section 10.3.

10.2 If, at any time during the life of this Agreement, the pressure base at which the gas delivered and purchased hereunder is changed or modified from the 14.65 psia, as herein provided, by any regulatory agency of the State or Federal Government having jurisdiction in the premises, the prices specified herein on which settlement is to be made shall be adjusted to conform to such new pressure base by the use of a factor, the numerator of which is the new pressure base (expressed in psia) and the denominator of which is 14.65 psia.

10.3 At least 90 days prior to the beginning of any five-year period, referred to in Subsection (c) of Section 10.1, representatives of the parties hereto shall meet for the purpose of determining the price to be charged and paid during such five-year period. If the parties are unable to agree upon the fair market price within 30 days thereafter, such price shall be determined by a Board of Arbitrators, created as hereinafter provided. One arbitrator shall be selected by Seller, one by Buyer, and the third by the first two so selected. In the event, upon demand by

either party, the other party shall fail to name an arbitrator within 10 days after such demand or in the event the two arbitrators first selected shall, within 10 days after their selection, be unable to agree upon a third arbitrator, the second and third arbitrators or the third arbitrator, as the case may be, shall be designated by the President of the

American Arbitration Association, or by the principal officer of its successors or then similar organization. If a majority of the arbitrators so selected shall be unable to agree upon a determination within 30 days after the selection of the third arbitrator, the Board of Arbitrators shall be discharged and a new board selected in the same manner as provided above for the selection of the first. Any determination by a majority of the Board of Arbitrators shall be binding upon the parties hereto in respect of the matter determined. The fees and expenses of the arbitrators shall be borne equally by the parties hereto.

ARTICLE XI - TAXES

11.1 Seller agrees to pay or cause to be paid all taxes lawfully levied on the gas delivered hereunder prior to its delivery to Buyer, and Buyer agrees to pay or cause to be paid all taxes lawfully levied on such gas after its receipt by Buyer, provided that Buyer shall have the right, at Buyer's option, to account for and pay to the taxing authority for Seller's account any and all such taxes which Seller may by law be obligated to pay or cause to be paid.

11.2 All taxes in effect on the date of this Agreement up to the respective

4. Contract No. 978-7/3/63 - Texaco, Inc.

GAS PURCHASE AND SALES AGREEMENT

THIS AGREEMENT, made this 3rd day of July, 1963, by and between PANHANDLE EASTERN PIPE LINE COMPANY, a Delaware Corporation, hereinafter called "Buyer," and TEXACO INC., a Delaware Corporation, herein called "Seller."

WITNESSETH:

WHEREAS, Seller owns or controls oil and gas leases covering the lands described in Exhibit "A", attached hereto; and

WHEREAS, Buyer owns and operates a gas pipe line system for which it desires to acquire an additional supply and reserve of gas. Buyer wishes to buy gas produced from the leases of Seller, described in Exhibit "A" hereunder; and

WHEREAS, Buyer and Cities Service Oil Company, as Seller, entered into a certain Gas Purchase and Sales Agreement dated March 24, 1960, covering the purchase and sale of natural gas produced from certain lands and leases in Texas County, Oklahoma which was heretofore amended by the parties by entering into an Amendment to Gas Purchase and Sales Agreement, dated November 4, 1960; and

WHEREAS, Buyer desires to purchase and Seller desires to sell the natural gas produced from the lands and leases described above, or Seller's interest in the natural gas produced from units of which said lands and leases are or may be a part, in accordance with the terms and conditions contained in said Gas Purchase and Sales Agreement, dated March 24, 1960, as amended on November 4, 1960, as herein modified.

NOW, THEREFORE, in consideration of the mutual obligations herein contained, Buyer and Seller do hereby adopt and ratify the terms and conditions of said Gas Purchase and Sales Agreement, dated March 24, 1960, as amended on November 4, 1960, and Buyer agrees to buy and Seller agrees to sell the natural gas produced from Seller's lands and leases described in Exhibit "A" or Seller's in-

terest in the gas produced from units of which said lands and leases are or may be a part in accordance with the provisions of, and during the terms set forth in said Gas Purchase and Sales Agreement, dated March 24, 1960, as amended on November 4, 1930,

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to Buyer by Seller hereunder shall be as follows:

(1) Commencing with the date of first production hereunder and until May 1, 1966, seventeen cents (17¢) per Mcf.

(2) At the beginning of each of the next four (4) succeeding five (5) year periods, the price shall be increased over the price for the preceding period one cent (1¢) per Mcf.

10.2 If at any time during the life of this Agreement, the pressure base at which the gas delivered and purchased hereunder is changed or modified from the 14.65 psia, as herein provided, by any regulatory agency of the state or federal government having jurisdiction in the premises, the price as specified herein on which settlement is to be made shall be adjusted to conform to such new pressure base by the use of a factor the numerator of which is the new pressure base (expressed in psia) and the denominator of which is 14.65 psia.

5. Seller hereby commits to the performance of this Agreement for the term hereof all of the natural gas which can be commercially produced from all depths between the base of the Chase Group of the Permian Age and the base of the Mississippian System underlying Seller's lands and leases, and from the leases or interests in the unit of which said lands and leases may be a part.

6. Except as herein amended, the parties hereto agree to carry out the terms and conditions of the Gas Purchase and Sales Agreement, dated March 24, 1960, as heretofore amended on November 4, 1960, in the same manner and to the same extent as though an Agreement identical therewith had been executed by the parties hereto with respect to the lands and leases above described. A copy of said Gas Purchase and Sales Agreement, dated March 24, 1960 and Amendment to Gas Purchase and Sales Agreement, dated November 4, 1960, are attached hereto and by reference made a part hereof.

APPENDIX LL

Release Dated May 1, 1967, Between Hugoton Production Company and Panhandle Eastern Pipe Line Company

RELEASE

KNOW ALL MEN BY THESE PRESENTS that Hugoton Production Company, a Delaware corporation (Hugoton), its successors and assigns, in consideration of the mutual release of claims herein provided and other good and valuable consideration, does hereby remise, release and forever discharge Panhandle Eastern Pipe Line Company (Panhandle), Anadarko Production Company (Anadarko), Trunkline Gas Company (Trunkline), and Century Refining Company (Century), each of which is a Delaware corporation, from all, and all manner of, action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, bonds, bills, specialties covenants contracts, controversies, agreements, promises, trespasses, judgments, executions, claims and demands whatsoever,

in law or in equity, that the said Hugoton now has, ever had, or may have by reason of any matter, cause or thing whatsoever from the beginning of the world up to and including the end of the day upon which this release is dated, against the said Panhandle, Anadarko, Trunkline or Century, except for any obligations and liabilities of Panhandle under the Agreement made April 27, 1967 between Panhandle and Hugoton and except for payment (to the extent not yet made) by Anadarko to Hugoton for gas heretofore sold by Hugoton to Anadarko under their agreement made as of July 1, 1965.

Panhandle, Anadarko, Trunkline and Century, their successors and assigns, in consideration of the mutual release of claims herein provided and other good and valuable consideration, do hereby remise, release and forever discharge Hugoton from all, and all manner of, action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, bonds, bills, promises, trespasses, judgments, executions, claims and demands whatsoever, in law or in equity, that the said Panhandle, Anadarko, Trunkline, and Century now have, ever had, or may have by reason of any matter, cause or thing whatsoever from the beginning of the world up to and including the end of the day upon which this release is dated, against the said Hugoton, except for any obligations and liabilities of Hugoton to Panhandle under the Agreement made April 27, 1967 between Panhandle and Hugoton.

Dated May 1, 1967

Hugoton Production Company
By /s/ (Illegible)
President

ATTEST:
/s/ (Illegible)
Ass't. Secretary

Panhandle Eastern Pipe Line Company
By /s/ (Illegible)
Vice President

ATTEST:
/s/ (Illegible)
Ass't. Secretary

Anadarko Production Company
By /s/ (Illegible)
Vice President

ATTEST:
/s/ (Illegible)
Ass't. Secretary

Trunkline Gas Company
By /s/ (Illegible)
Financial Vice President

ATTEST:
/s/ (Illegible)
Secretary

Century Refining Company
By /s/ (Illegible)
Vice President

ATTEST:
/s/ (Illegible)
Secretary

APPENDIX MM

Contract Between United States of America and National Helium Corporation

CONTRACT FOR THE SALE AND PURCHASE
OF A HELIUM-GAS MIXTURE
between
NATIONAL HELIUM CORPORATION
and
THE UNITED STATES OF AMERICA

Dated October 13th, 1961

CONTRACT FOR THE SALE AND PURCHASE OF A HELIUM-GAS MIXTURE BETWEEN NATIONAL HELIUM CORPORATION AND THE UNITED STATES OF AMERICA

THIS CONTRACT, made and entered into this 13th day of October, 1961, is by and between National Helium Corporation (hereinafter called Seller), a corporation organized and existing under the laws of the State of Delaware, with its principal offices at Liberal, Kansas, and the United States of America (hereinafter called Buyer) acting through the Director, Bureau of Mines, Department of the Interior, Washington, D. C.

WITNESSETH THAT:

WHEREAS, the Secretary of the Interior is authorized pursuant to the Helium Act, approved September 13, 1960 (P. L. 86-777; 74 Stat. 918; 50 U. S. C. 167), hereinafter called the Act, to make contracts and agreements for the acquisition, processing, transportation, and conservation of helium, helium-bearing natural gas, and helium-gas mixtures upon such terms and conditions, and for such periods, not exceeding twenty-five (25) years, as may be necessary to accomplish the purposes of the Act; and

WHEREAS, the Director, Bureau of Mines, is authorized pursuant to a delegation from the Secretary of the Interior (26 F. R. 2095) to exercise certain authority of the Secretary under the Act; and such delegation provides the authority required by the Director, Bureau of Mines, to enter into this contract for and on behalf of Buyer; and

WHEREAS, natural gas flowing through certain of Panhandle Eastern Pipe Line Company's pipelines in the vicinity of Liberal in the State of Kansas is known to contain approximately forty one-hundredths (0.40) of one percent helium by volume, as indicated by analyses of numerous gas samples taken during the last three (3) years; and

WHEREAS, Seller has entered into a contract dated as of October 2, 1961 with Panhandle Eastern Pipe Line Company and thereby acquired the right to extract helium from the helium-bearing natural gas described in the preceding paragraph; and

WHEREAS, the Director, Bureau of Mines, has determined that acquisition by Buyer of helium from such natural gas is needed to accomplish the purposes of the Act; and

WHEREAS, Seller desires to extract a helium-gas mixture from the natural gas described in the preceding paragraphs and to sell the extracted helium-gas mixture to Buyer.

NOW, THEREFORE, in consideration of the premises and agreements contained herein, Seller and Buyer mutually covenant and agree as follows:

ARTICLE I.

Definitions.

The following terms when used in this contract shall have the following meanings:

1.1 *Plant*—The term "plant" shall mean Seller's helium extraction plant—including the plant site, easements and rights-of-way, all buildings, machinery, piping, and other real or personal property owned or used by Seller for the extraction of helium from natural gas—whether completed or under construction and whether separate from or integrated with other facilities owned by Seller.

1.2 *Natural gas*—Except as used in paragraph 7.3(a), the term "natural gas" shall mean the helium-bearing natural gas made available for processing through Seller's plant.

1.3 *Shrinkage and fuel gas*—The term "shrinkage and fuel gas" shall mean the reduction in the volume of natural gas occurring as a result of the helium extraction operation in Seller's plant and any natural gas consumed as fuel in Seller's plant.

1.4 *Helium-gas mixture*—The term "helium-gas mixture" shall mean the gaseous product resulting from the helium extraction operation in Seller's plant, which product is comprised of helium predominantly together with other constituents of the natural gas.

1.5 *Contained helium*—The term "contained helium" shall mean the helium contained in the helium-gas mixture.

1.6 *Standard cubic foot*—The term "standard cubic foot" shall mean the volume of natural gas, helium-gas mixture, or

contained helium, as the case may be, contained in one cubic foot of space when at a temperature of sixty (60) degrees Fahrenheit and at an absolute pressure of fourteen and sixty-five one-hundredths (14.65) pounds per square inch.

1.7 *Mc.f.*—The term "Mc.f." shall mean one thousand (1,000) standard cubic feet.

1.8 *MMc.f.*—The term "MMc.f." shall mean one million (1,000,000) standard cubic feet.

1.9 *Day*—The term "day" shall mean a period of twenty-four (24) consecutive hours beginning and ending at eight o'clock a.m. Central Standard Time.

1.10 *Month*—The term "month" shall mean a period of time beginning at eight o'clock a.m. Central Standard Time on the first day of a calendar month and ending at eight o'clock a.m. Central Standard Time on the first day of the succeeding calendar month.

1.11 *Contract year*—The term "contract year" shall mean a period of twelve (12) consecutive months beginning at eight o'clock a.m. Central Standard Time on the day of the month corresponding with the date of this contract and ending at eight o'clock a.m. Central Standard Time on the same day and month in the succeeding year.

1.12 *Calendar year*—The term "calendar year" shall mean the calendar year used by the Bureau of Labor Statistics, United States Department of Labor.

1.13 *Fiscal year*—The term "fiscal year" shall mean the fiscal year of the Federal Government.

1.14 *Contracting Officer*—The term "Contracting Officer" shall mean the person holding the office of Director of the Bureau of Mines at the time of the execution of this contract, his duly appointed successors, and his or their duly authorized representatives.

1.15 *Secretary*—The term "Secretary" shall mean the Secretary of the Department of the Interior.

1.16 *Affiliated company*—The term "affiliated company" shall mean a company in which Seller owns or controls twenty-five (25) percent or more of the voting stock, or a company which owns or controls twenty-five (25) percent or more of the voting stock of Seller, or any other corporation at least twenty-five (25) percent of whose issued and outstanding stock entitled to vote for the election of directors is owned or controlled, directly or indirectly, by Panhandle Eastern Pipe Line Company or National Distillers and Chemical Corporation.

1.17 *Psia*—The term "Psia" shall mean pounds per square inch absolute.

1.18 *Psig*—The term "Psig" shall mean pounds per square inch gage.

1.19 *New York bank prime rate of interest*—The term "New York bank prime rate of interest" shall mean the rate of interest charged on short-term loans to substantial depositors with highest credit rating by the Chemical Bank New York Trust Company, or its successor

ARTICLE II.

Sale and Purchase of Helium-Gas Mixture.

2.1 Seller shall tender for delivery and sell to Buyer all of the helium-gas mixture extracted in Seller's plant, and Buyer shall pay for, whether taken or not, all of the helium-gas mixture extracted in Seller's plant and tendered for delivery to Buyer; except that the obligation of Buyer in this respect shall be limited to that volume of such helium-gas mixture which would require total payments by Buyer to Seller of Fifteen Million Two Hundred Thousand Dollars ($15,200,000) in any fiscal year hereinafter called "maximum annual payment"; provided that such maximum annual payment shall be adjusted at the same time as

and in the same ratio as the unit price is adjusted under the provisions of paragraphs 7.3 and 7.4 hereof and further provided that such adjustment shall be made only to the extent that the adjusted annual obligation under this contract when added to the then existing annual obligations of Buyer under all other contracts entered into by Buyer under the Act shall not require Buyer to exceed in any fiscal year the fiscal limitations of Section 3(a)(2) of the Act and any related appropriations acts or any amendments to the Act or acts increasing such limitations.

2.2 Prior to the beginning of each fiscal year, Seller will give Buyer notice of the quantity of helium-gas mixture which Seller expects to have available during such fiscal year in excess of the quantity requiring the maximum annual payment. Such notice shall not obligate Seller to tender for delivery any helium-gas mixture in excess of the actual volume extracted by Seller. In the event that said volume extracted by Seller exceeds the volume requiring the maximum annual payment, Seller shall have no obligation to tender the excess volume unless within forty-five (45) days after the beginning of each fiscal year, Buyer shall elect in writing to purchase or if not purchased to pay for during said fiscal year an additional quantity of helium-gas mixture. All volumes of excess helium-gas mixture purchased by Buyer from Seller shall be purchased in accordance with the terms of this contract.

2.3 Buyer agrees that Seller may save for its own use, sell to other parties, or otherwise dispose of any helium-gas mixture extracted in the plant in excess of that which Seller is obligated to sell to Buyer hereunder and any helium-gas mixture which Buyer does not accept for any reason.

2.4 If at any time Buyer fails to take delivery of helium-gas mixture tendered to it by Seller, Seller may continue or suspend the operation of the plant until Buyer notifies Seller that Buyer is ready to resume taking such delivery. During such

period, the volume which shall be considered as extracted and tendered to Buyer shall be determined as follows:

(a) If the plant continues to extract helium-gas mixture during such period and such mixture is measured in accordance with the provisions of Article X, the results of such measurement shall apply.

(b) If the plant does not continue to extract helium-gas mixture during such period or if for any reason it is not feasible to measure the mixture in accordance with the provisions of Article X, the volume of helium-gas mixture which shall be considered as tendered to Buyer shall be a computed volume, based upon the volume of helium in the natural gas available for processing by the plant during such period and the recovery factor experienced during the five (5) day period of operations immediately preceding the failure of Buyer to accept delivery.

2.5 Seller agrees that it will not sell any helium produced in the plant to any purchaser other than Buyer at a price lower than the lowest price paid by any agency of the United States for helium acquired from any private plant under any contract entered into pursuant to Section 3 of the Act and outstanding at the time of such sale. Upon request of Seller, Buyer shall supply Seller with information as to such lowest price so paid by any agency of the United States.

2.6 The volume of helium-gas mixture which Buyer is obligated to purchase under paragraphs 2.1 and 2.2 shall be reduced by the volume of helium-gas mixture sold by Seller to any purchaser other than Buyer or saved for Seller's own use in any fiscal year; provided, however, that the volume which Buyer is obligated to purchase or to pay for, whether taken or not, under paragraphs 2.1 and 2.2 shall not be so reduced by the sale by Seller to any other purchaser or by the use by Seller of any helium-gas mixture in excess of said volume.

ARTICLE III.

Effective Date and Term.

3.1 This agreement shall become effective at eight o'clock a.m. Central Standard Time on the date of this agreement and shall expire at eight o'clock a.m. Central Standard Time twenty-two (22) years after such date unless sooner terminated as hereinafter provided.

ARTICLE IV.

Facilities.

4.1 Seller agrees to construct, or cause to be constructed, with reasonable promptness and diligence, and at its own risk and expense, a plant to be located in the vicinity of Liberal, Kansas, which shall be capable of processing approximately eight hundred forty (840) MMc.f. of natural gas a day containing approximately forty one-hundredths (0.40) of one percent helium by volume for the extraction of helium in a manner to recover not less than ninety (90) percent by volume of the helium in the natural gas so processed. Seller estimates that the plant will be completed and ready to make the initial delivery of helium-gas mixture hereunder within eighteen (18) months after the effective date of this contract and Seller agrees that it will be ready to make the initial delivery hereunder within twenty-four (24) months after the effective date of this contract.

4.2 Buyer agrees to construct, or cause to be constructed, with reasonable promptness and diligence, and at its own risk and expense, a pipeline capable of receiving the daily helium-gas mixture tendered for delivery by Seller hereunder, and Buyer agrees to be prepared within eighteen (18) months after the effective date of this contract to receive the helium-gas mixture tendered for delivery by Seller.

4.3 Each party shall have exclusive control over the facilities which it shall construct or cause to be constructed pur-

suant to this contract and shall operate and maintain, or cause to be operated and maintained, such facilities throughout the life of this contract.

4.4 It is expressly understood and agreed by both parties hereto that the helium content and volume of natural gas available for processing in Seller's plant will vary from time to time depending upon the production and availability of such natural gas from various wells and fields and upon the requirements for delivery of such gas to fulfill the needs of domestic and industrial fuel gas consumers. Specifically recognizing this situation, Seller agrees to use its best efforts to maintain a supply of natural gas and to operate its plant to recover the maximum quantity of helium consistent with the foregoing.

4.5 Either party in its discretion may, without liability therefor, suspend or curtail operation of its facilities for purposes of construction, expansion, and maintenance as may be necessary in the performance of this contract, provided Buyer shall not thus be relieved of its obligation to take or pay for helium-gas mixture under the provisions of Article II for more than five (5) days during any fiscal year. As an incident to such suspension or curtailment, Seller may, to the extent it deems necessary, bypass natural gas around the plant. The term of this contract shall not be extended because of any such suspension or curtailment.

4.6 Seller shall not be obligated to provide storage facilities or to store the helium-gas mixture produced under this agreement.

4.7 Nothing in this contract shall preclude Seller, or others authorized by Seller, from installing and operating equipment for the extraction of hydrocarbons from the natural gas, provided that no part of the cost of any such hydrocarbon operation, or revenues therefrom, shall be allocated or attributed to the extraction or sale of helium or helium-gas mixture.

ARTICLE V

Quality of Helium-Gas Mixture.

5.1 The contained helium in the helium-gas mixture tendered for delivery by Seller under this contract shall be not less than sixty (60) percent of the total volume of such mixture tendered for delivery in any contract year; and Buyer shall not be obligated to accept and receive delivery hereunder of any helium-gas mixture containing less than fifty-five (55) percent helium by volume.

5.2 Buyer may, at its sole option, accept and receive delivery of helium-gas mixture that fails to meet the quality requirements specified in the preceding paragraph 5.1, and in such event, payment therefor shall be calculated on the basis of the actual contained helium therein.

ARTICLE VI.

Delivery.

6.1 Seller shall tender for delivery to Buyer and Buyer shall accept and receive the helium-gas mixture sold and purchased hereunder at the point where the pipeline to be furnished by Buyer shall connect with the outlet of Seller's measurement facilities at or near Seller's plant.

6.2 Seller shall tender the helium-gas mixture to the Buyer at the point of delivery specified in paragraph 6.1 against the varying pressures in Buyer's pipeline, but in no event shall Buyer maintain the pressure in such pipeline in excess of eighteen hundred (1,800) Psig at the point of delivery.

6.3 Seller shall tender for delivery helium-gas mixture to Buyer at the point of delivery specified in paragraph 6.1 at a temperature which shall not exceed one hundred and ten (110) degrees Fahrenheit.

ARTICLE VII.

Price.

7.1 Payment for the helium-gas mixture sold and purchased hereunder shall be calculated and made on the basis of the contained helium therein. The unit price specified herein represents only the value of the contained helium and is applicable only to such contained helium. For the purposes of this contract, no value has been ascribed to gaseous products other than helium in the helium-gas mixture sold and purchased hereunder. Notwithstanding the foregoing, it is expressly understood and agreed by both parties hereto that payment in accordance with this article shall constitute full and complete payment for helium, nitrogen, methane, and any and all other constituents of the helium-gas mixture.

7.2 The initial unit price shall be $11.78 per Mc.f. of contained helium in the helium-gas mixture tendered for delivery, subject to adjustments provided for hereinafter, but in no event shall the unit price ever be lower than $9.68 per Mc.f. of contained helium.

7.3 For the purpose of unit price adjustments provided for in this paragraph 7.3 the initial unit price is considered to consist of two parts, which are described below, each of which shall be adjusted in the following manner, and the unit price payable hereunder shall be adjusted accordingly, to wit:

(a) Part one—91 cents. This part one of the initial unit price represents the cost in the field of shrinkage and fuel gas as defined in Article I. In negotiating the initial unit price, the parties have assumed the weighted average purchase price of natural gas purchased by Panhandle Eastern Pipe Line Company and delivered into pipelines serving Seller's plant to be 12.1 cents per Mc.f. This part one of the initial unit price shall be adjusted at the beginning of each fiscal year after the effective date of this contract. It shall be increased at the rate of seventy five one-hundredths cents (0.75¢) for each one-tenth cent (0.1¢) increase, or de-

creased at the rate of seventy five one-hundredths cents (0.75¢) for each one-tenth cent (0.1¢) decrease in the weighted average gas purchase price of natural gas purchased by Panhandle Eastern Pipe Line Company and delivered into pipelines serving Seller's plant during the six (6) months prior to each fiscal year. In determining the weighted average purchase price, no consideration shall be given to any purchase of natural gas by Panhandle Eastern Pipe Line Company from any affiliated company, except where such purchase and the prices applicable to same are subject to the approval of the Federal Power Commission. If as a result of a valid final order of the Federal Power Commission a refund is made to Panhandle Eastern Pipe Line Company for gas purchased and delivered into pipe lines serving Seller's plant, which refund affects either the initial weighted average purchase price set out above or any subsequent weighted average purchase price to be determined in accordance with this subparagraph (a), such initial or subsequent weighted average purchase price shall be adjusted accordingly for the purpose of future price adjustments under this subparagraph (a), however, no change shall be made in the unit price for contained helium delivered prior to such adjustment.

(b) Part two—$10.87. This part two of the initial unit price represents the major portion of the initial unit price and is equal to the initial unit price less the amount specified in the preceding subparagraph (a) which shall be adjusted separately. This part two of the initial unit price shall be adjusted at the beginning of each fiscal year after the effective date of the contract. This part two of the initial unit price shall be increased eighty one one-hundredths cents (0.81¢) for each one-tenth (0.1) point of increase in the wholesale price index for all commodities except farm and foods above a base wholesale price index as hereinafter defined, or decreased eighty one one-hundredths cents (0.81¢) for each one-tenth (0.1) point of decrease in the wholesale price index for all commodities except farm and foods below the base wholesale price index. The base wholesale price index as used herein shall be one hundred and twenty-eight and three-tenths (128.3),

which is the arithmetical average of the monthly wholesale price indexes for all commodities except farm and foods for the 1960 calendar year, as published by the Bureau of Labor Statistics, United States Department of Labor, relative to the base period 1947-1949. The wholesale price index used in each adjustment shall be the arithmetical average of the monthly wholesale price indexes relative to the base period 1947-1949 for all commodities except farm and foods for twelve (12) calendar months, May through April, preceding the fiscal year for which adjustment is made; and in the event that this index is published by the Bureau of Labor Statistics relative to a base period other than 1947-1949, the wholesale price index used in each adjustment period shall be the arithmetical average of the monthly wholesale price indexes for all commodities except farm and foods for the twelve (12) calendar months described above as related to the 1947-1949 period.

7.4 In addition to the unit price adjustments prescribed in paragraph 7.3, the unit price shall also be adjusted whenever appropriate as follows:

(a) If the Federal Power Commission or any other agency of the United States should order that Panhandle Eastern Pipe Line Company's joint costs of exploration, production, gathering, extraction, processing, compression, transportation, or storage of natural gas be divided and allocated for rate making purposes to helium delivered hereunder on any basis other than a volumetric basis, the unit price to be paid by Buyer hereunder shall be adjusted upward or downward for and during any period covered or affected by such order to reflect the difference between the costs so divided and allocated and the costs divided and allocated on a volumetric basis; and

(b) If Seller should be required to pay any new taxes as defined hereinafter, the unit price to be paid by Buyer hereunder shall be adjusted as of the effective date of such taxes to compensate Seller therefor. "New taxes", by whatever name called, shall mean and include any and all taxes, imposts, levies, fees and assessments enacted subsequent to the effective date of this contract, and which

Seller is required to pay directly or through an affiliated company upon the extraction and sale of helium delivered hereunder, or upon the facilities therefor, and any such taxes, imposts, levies, fees and assessments which Seller is required to pay directly or through an affiliated company upon the transportation or delivery of helium-bearing natural gas and which Seller or an affiliated company would not otherwise be required to pay without regard to the helium content of the natural gas. New taxes shall not include any increased rates in taxes in existence on the date of this contract.

7.5 In addition to all other amounts payable under this contract, Buyer shall pay to Seller all amounts, except as hereinafter provided, that Seller shall pay subsequent to the date of this contract, directly or through an affiliated company, to parties other than itself or an affiliated company for helium theretofore extracted by Seller or for the acquisition of helium in the natural gas, as defined herein, or for any interest in such helium. Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer; and for the purposes of this paragraph 7.5, Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state. Further, Buyer shall be deemed to have consented to any and all such payments under circumstances similar to any such judicially determined claim if such payments are made generally in accordance with the findings, principles, and conclusions of any such judicial determination. The amounts that Buyer shall be required to pay to Seller in accordance with this paragraph shall not include an amount to be calculated applicable to each such acquisition equal to twenty seven and one-half percent (27.5%) of the weighted average of part two of the unit price or unit prices in effect during the time covered by such acquisition multiplied

by the volume in Mc.f. of helium in the natural gas, as defined herein, covered by such acquisition.

7.6 Insofar as practicable, Seller shall compute and notify Buyer in writing of each adjusted unit price within thirty (30) days after the beginning of the fiscal year during which such adjusted unit price is to be applicable. The notification by Seller to Buyer shall include pertinent data in support of any increases and decreases in the various items listed in paragraphs 7.3 and 7.4 hereof and describe in reasonable detail the computation made by Seller in determining each adjusted unit price.

ARTICLE VIII.

Ownership and Title.

8.1 The helium-gas mixture sold and delivered by Seller to Buyer hereunder, including all of the constituents thereof, shall become the property of Buyer at the point of delivery specified in Article VI hereof.

8.2 Seller hereby agrees to indemnify and save Buyer harmless from any and all claims of third parties to the helium-gas mixture sold and delivered to Buyer under the terms of this contract. Such indemnification and save harmless is subject to the obligation of Buyer to make certain payments to Seller in accordance with Article VII. Seller agrees further that upon request by Buyer, Seller shall make available at its principal office such documentary evidence as it has in its possession covering Seller's rights, titles, and interests in and to the helium-gas mixture delivered hereunder.

ARTICLE IX.

Billing and Payment.

9.1 Seller shall on or before the tenth day of each calendar month render to Buyer a billing statement showing for the preceding calendar month the volume of helium-gas mixture tendered for delivery hereunder, the percentage of helium in

such helium-gas mixture, the calculated volume of contained helium therein, the applicable unit price, and the total sum of money due and payable to Seller therefor.

9.2 Buyer shall on or before the twenty-fifth day of each calendar month pay to Seller at Seller's designated address the amount of money due Seller for the helium-gas mixture tendered for delivery hereunder in the preceding calendar month.

9.3 In the event that a billing statement by Seller is delayed beyond the date when such statement is due as provided in paragraph 9.1, then the time of payment by Buyer as provided in the preceding paragraph 9.2 shall be extended by the period of such delay.

9.4 Seller shall bill Buyer separately for any amounts due Seller for any reason under this contract other than for current helium deliveries, and Buyer shall pay to Seller such amounts within thirty (30) days after receipt of such billing unless such payments would require Buyer to exceed the fiscal limitation expressed in Article II of this contract and unless funds therefor are not otherwise available, but in any event such payments shall be due on receipt of such billing for the purposes of paragraph 9.6. In the event that Buyer should be unable for such reasons to make the required payments to Seller within the specified thirty (30) days, Buyer shall make such payments as soon as possible in the current fiscal year or in succeeding fiscal years.

9.5 In the event that Buyer discovers an error in the billing statement, or in any of the evidence submitted in support of such statement, Buyer shall pay the amount billed or the amount determined by Buyer to be due and payable upon correction of said error, whichever is the lesser, and adjustments between the parties hereto of any amounts due shall be made on the billing statement for the succeeding month following correction of such errors. In the event that an error

is discovered in the amount in any billing statement, such error shall be adjusted within thirty (30) days following determination of the extent of such error provided that claim therefor shall have been made within twelve (12) months from the date of such billing statement.

9.6 In the event that any payments by Buyer in accordance with this Article IX, other than payments pursuant to paragraph 7.5, are not made within thirty (30) days after the date on which such payment is due, each such payment shall bear interest from such thirtieth day at a rate of interest equal to the New York bank prime rate of interest in effect on such day. Interest shall not accrue nor be payable on payments pursuant to paragraph 7.5.

ARTICLE X.

Measurement.

10.1 The unit of measurement for the helium-gas mixture and contained helium hereunder shall be "Mc.f." as defined in Article I of this contract. The helium-gas mixture shall be measured at its pressure and temperature in the measurement equipment, and the volumes of helium-gas mixture and contained helium shall be calculated to the unit of measurement in accordance with Ideal Gas Laws corrected for deviation as provided in this Article X, or as the parties may hereafter otherwise mutually agree. The atmospheric pressure at the meter shall be assumed to remain constant at thirteen and four-tenths (13.4) pounds per square inch absolute.

10.2 Seller shall construct, install, own, operate, and maintain as a part of its plant, except the Burnett-type apparatus described in paragraph 10.5, all equipment necessary for measurement and analysis of the helium-gas mixture tendered for delivery hereunder. All such equipment, except for the Burnett-type apparatus described in paragraph 10.5 and chart integrator, shall be installed on the plant site and shall

be housed in weatherproof and air-conditioned buildings when practicable. The Buyer may, at its option and expense, install telemetering equipment on Seller's meter runs; however, such telemetering instruments shall be separate from Seller's recording meters used for billing purposes.

10.3 The helium-gas mixture delivered shall be measured by orifice meters installed and operated in accordance with methods prescribed by the American Gas Association, Gas Measurement Committee Report No. 3, together with all supplements, amendments, and appendices thereto, designated "Orifice Metering of Natural Gas," dated April 1955; provided, however, if it is found that such report is not applicable to the measurement of such helium-gas mixture to the extent that measurements made in accordance with such report are found to be in error by more than five-tenths (0.5) of one percent, then the parties hereto shall seek some reasonable and practical method to correct such error.

10.4 Orifice meters shall be subjected to the following tests and inspections:

a. Differential gages shall be tested for and adjusted, if necessary, to "zero" twice a week and shall be calibrated with a water column once each month;

b. The static pressure element shall be calibrated with a dead weight tester at least once each month;

c. The orifice plates shall be removed and inspected at least once each month, and cleaned or replaced as required.

d. The meter tubes shall be inspected at least once each year.

10.5 Deviation of the helium-gas mixture from the Ideal Gas Laws shall be obtained by joint determinations covering the expected pressures, temperatures, and compositions of such mixture in the meter. The Burnett-type apparatus, operated

in accordance with article of E. S. Burnett entitled "Compressibility Determinations Without Volume Measurements," Jour. Appl. Mech., vol. 3, Dec. 1936, pp. A136-140, shall be used in making such determinations, unless the parties agree upon the use of other apparatus and method for making such determinations. The results of such determinations shall be tabulated in increments of ten (10) pounds per square inch pressure, one (1.0) degree Fahrenheit temperature, and one (1.0) percent in composition for each component of the helium-gas mixture. Upon the request of either party, an additional set of determinations shall be made once each calendar year at the mutual expense of the parties, provided other sets of determinations shall be made at any time at the request and expense of the requesting party. Each such additional or other set of determinations shall be limited to the range of pressures, temperatures, and composition theretofore experienced in actual meter operations, tabulated as above provided, and thereafter, each such set of determinations shall be used until a subsequent set of determinations is made.

10.6 Temperature determinations shall be obtained by the use of a continuous recording thermometer so installed that it will properly record the flowing temperature of the helium-gas mixture in the meter run. Temperature recorders shall be calibrated at least once each month with mercury test thermometers.

10.7 Seller shall have the right, at its expense, to install, operate, and maintain back pressure regulator downstream of the meters on Buyer's line.

10.8 Specific gravity determinations shall be obtained by the use of a continuous recording gravitometer having a mutually acceptable range and so installed that it shall properly record the specific gravity of the helium-gas mixture passing through the meter runs. Said gravitometer shall be checked for temperature and barometric pressure compensation at least once each day and tested with an Edwards-type gravity balance, or other

type of gravity balance as may be mutually agreed upon, at least once each week.

10.9 Seller shall install, operate, and maintain near the point of measurement a continuous or essentially continuous recording analytical instrument for determining the percentage of helium by volume in the helium-gas mixture. This analytical instrument shall be a mass spectrometer designed for this purpose or other type of analytical instrument mutually agreed upon by the parties. It shall be installed, operated, and maintained in accordance with its manufacturer's recommendations or as mutually agreed upon and shall be tested and calibrated as often as is necessary for proper and satisfactory operation. The percentage of helium in samples used in such tests and calibration shall be determined by laboratory analysis utilizing the charcoal adsorption principle as described in Bureau of Mines Information Circular 6796 or other mutually acceptable method and such analysis shall be mutually acceptable to both parties.

10.10 Seller shall install, operate, and maintain near the point of measurement, suitable equipment to collect each day, at a continuous uniform rate, a twenty-four (24) hour representative sample of the helium-gas mixture tendered for delivery. Seller shall make available to the United States at the plant site a portion of this sample and shall retain for thirty (30) days an additional portion adequate for laboratory analysis by charcoal adsorption as referenced in paragraph 10.9.

10.11 The parties may mutually agree upon other and additional tests and inspections of all measuring equipment specified hereunder and other and additional time intervals for making such tests and inspections provided in Article X. Nothing herein shall be construed to limit either party's right to test, inspect, calibrate, and adjust any of its measuring equipment covered by Article X. Each party will supply the other upon request with records of all such tests, inspections, calibrations, and adjustments.

10.12 Each party shall have the right, at reasonable times, to inspect measuring equipment installed and operated by the other party in the presence of a representative of the installing party and to ask for tests and witness tests thereof but in no way to alter or in any manner disturb, manipulate, or adjust the facilities of the other party. If either party at any time desires such a test or inspection of any meter or facility pertaining to measurement hereunder or if a party observes a variation between meters upon which a billing statement is based and any check meter, such party shall promptly notify the other party thereof. Each party shall give the other party reasonable notice of the time of daily, weekly, monthly, and annual tests and inspections of measuring facilities in advance of the holding of such tests and inspections so that the other party may conveniently have its representatives present.

10.13 If, upon test or inspection, any part of any measuring equipment, including recording helium analyzer, is found to be inaccurate by not more than one (1) percent of the range of the instrument, previous recordings of such equipment shall be considered as being correct in measuring deliveries hereunder, but such equipment shall be adjusted to record accurately. If, upon test or inspection, any part of any measuring equipment is found to be inaccurate by an amount exceeding one (1) percent of the range of the instrument and such inaccuracy affects the volume of helium measured by more than five-tenths (0.5) of one percent at a recording corresponding to the average hourly rate of flow for the period since the last preceding test, then any previous recordings of such equipment shall be corrected to zero error for any period which is known definitely or agreed upon, but in case the period is not known definitely or agreed upon, such corrections shall be for a period extending over one-half of the time elapsed since the date of last test, not exceeding a correction period of sixteen (16) days.

10.14 The volume of contained helium shall be determined by multiplying the volume of helium-gas mixture by the volume percentage of helium. The helium percentage used in this computation shall be as determined by the recording analytical instrument described in paragraph 10.9 if it is operative; otherwise a laboratory analysis (utilizing the charcoal adsorption principle previously referenced) of the representative gas sample described in paragraph 10.10 shall be used. One such computation shall be made for the volume of contained helium tendered for delivery hereunder each day, utilizing the arithmetical average of the average hourly readings for all of the factors required in such computation, unless both the rate of delivery and the helium percentage in the helium-gas mixture varies more than ten (10) percent from such arithmetical average for longer than one (1) hour during a day. In such event, the volume of contained helium tendered for delivery on that day shall be computed on an hourly basis; provided the recording instrument for determining the helium percentage is operative.

10.15 Charts and records from all measuring facilities to be used for billing computations shall remain the property of Seller. Seller shall submit to the Buyer records and charts from said measuring facilities, together with calculations therefrom, for inspection subject to return to Seller within sixty (60) days after receipt thereof. Such charts and records shall be kept on file by Seller for the mutual use of the parties for a period of not less than two (2) years from date of such charts and records.

10.16 Each party shall have the right, at its expense, to install, operate, and maintain facilities for checking measurements provided in this Article X which, without limitation, includes meters, gas analyzers, telemeters, and associated equipment of such kind and character as either party may desire; however, all measurements for billing purposes shall be those

of Seller. Such facilities shall be installed, operated, and maintained so as to in no way affect the accuracy of Seller's measuring facilities. Each party shall, at reasonable times, have access to the checking facilities installed by the other party. The reading, calibration, and adjustment of check facilities shall only be made by employees or agents of the installing party. Charts, records, and computations from checking facilities shall remain the property of the owner of such facilities. However, such charts, records, and computations shall be submitted upon request to the other party for inspection and copying subject to return within sixty (60) days after receipt thereof.

10.17 In the event that any of the samples or any of the records mentioned in this Article X are lost, damaged, or destroyed, and the parties should be unable to otherwise agree upon a basis of determining any factors that are unknown by reason of such loss or damage, then the readings of such records or results of such analyses shall be computed the same as the average corresponding readings or results prevailing in either a five (5) day interval preceding or following the period in question, or both intervals if readings and results are available for each.

ARTICLE XI.

Regulation.

11.1 This contract is subject to valid orders of duly constituted authorities having jurisdiction or control over the parties, their facilities, helium-bearing natural gas, helium-gas mixtures, helium, this contract, or any provision thereof.

ARTICLE XII.

Termination.

12.1 Buyer may, at its option, terminate this contract at any time if, (1) in the opinion of the Secretary of the Interior, the discovery of large new helium resources or a substantial

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds*, there considered and rejected. It would serve no purpose to again consider these arguments. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

It must be accepted that the "value" sought to be determined in this suit is basically a factual matter determined through the application of the appropriate legal doctrines. This is the value at the wellhead of the helium commingled with the natural gas there being produced.

The appellants here urge as a basic error by the trial court that it chose the wrong method in arriving at this "value." The trial court determined that there was no prevailing market value for the commingled helium, there was no free competitive market for this helium at the wellhead. The court thus used a market value for the ultimate product less the cost of beneficiation of the helium-bearing gas. The defendants urge that the trial court had sufficient evidence before it of a "market value" of the commingled helium at the wellhead.

The defendants, on their "market value" theory, put on testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component. These described events covered a broad time span and a wide geographical distribution. They involved both governmental agencies and private parties.

[1] The trial court, in holding that there was no free competitive market, held that these transactions were of no probative value because they were not comparable. It thus concluded that the evidence failed to establish a "market price" by comparable sales. We reach the same

conclusion. The transactions described by the witnesses for the defendant were too remote in time or place, and otherwise could not be considered as comparable. The testimony did not show a free market condition to establish a usable price. It is apparent that the gas stream here concerned with all its components was directed by the FPC, and was locked in by the jurisdictional gas. There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases. The helium thus had to go along with the stream. The purchasers of the stream here concerned, of course, took the position that they owned the entire contents, and were not required to pay anything more. This litigation demonstrates the character of the market, the Government domination of the market, and the strength of bare possession.

In the market price evidence of the defendant, considerable detail is presented as to purchases at the several Government helium plants. These include the plants at Exell, Otis, Cunningham, and Navajo. The helium purchases or gas purchases at these plants were made during World War II. The years which have passed since "The War" would seem to cast more than a doubt that these could possibly be comparable sales. The purchases at the Navajo plant were renegotiated after the War in 1955 and 1959, but again this cannot be a comparable transaction. The stream from the Rattlesnake production had no use as a fuel. It did have a high helium content, but nothing is developed as to any other market for this gas. The Government had for all practical purposes a monopoly on sales of helium until about 1962.

There was also testimony as to purchases of gas by the Government for the Keyes plant in 1958. The price was somewhere near $2.00 per Mcf. The production costs

at this plant were about $15.50 per Mcf. The basic interest of the seller was to make the residue gas marketable by raising the BTU. The seller also assumed liability for possible additional payments to third parties.

The Otis plant was also used to upgrade the gas for fuel purposes by separating out the noncombustible portions of the stream.

Phillips also introduced evidence as to several *contracts* it had made for the payment for components of the gas production purchased. Some mentioned helium, some did not. This was a dollar price in some, and a formula as for all other components in others. These are not of particular significance, especially the casinghead gas contracts, because there was no evidence that the casinghead gas contained helium nor was ever processed for helium. As to the other Phillips contracts, there was no showing that the gas had a helium content at all (with insignificant exceptions), nor that there was ever a remote possibility of extraction, again with insignificant exceptions. Contractual provisions in such a context, even where helium was mentioned, are a meaningless gesture of the parties, and cannot be considered as evidence of comparable sales.

The Gas Sales Agreement between Colorado Interstate and Alamo Chemical Company (a Phillips affiliate or subsidiary) was put in evidence. This provided for the processing of gas produced in Morton County, Kansas, for the removal of helium and liquefiable hydrocarbons. The plant operator was to pay $2.00 per Mcf for helium extracted at the plant. This price was not negotiated, and it seems reasonable to assume that this was because there was litigation pending as to the obligations to pay for helium involving the parties. The contract limited the sellers' liability on the title warranty of helium to $2.00

per Mcf. There was no contract provision for payment for hydrocarbons removed. This contract must be considered for all practical purposes as a post-litigation contract. There was also in evidence a gas exchange agreement between Phillips and Pioneer Natural Gas Company. This had a price for helium but there were other contractual considerations such as delivery of gas at other locations, and payment for only part of the helium. This agreement cannot be considered as a comparable sale.

The testimony of the defendants and evidence was thus directed to "other sales" in other places and other times. There was no substantial showing that these were "comparable sales." Evidence of "other sales" falls far short of establishing a market without comparability being clearly established.

[2] In addition to the evidence relating to particular contract provisions, and some sales, there was expert testimony. The plaintiffs and defendants had expert witnesses who testified as to what the value of helium should be. This testimony produced by both sides is of theoretical interest, presents a facet of the entire conservation program, and a description of the few independent private enterprises which tried to enter the field. No matter how interesting, this evidence is only opinion evidence, and does not establish facts. This testimony comes well down on the scale of acceptable evidence as to value. It is obvious that comparable sales or current market price is the best, and second would come the work-back method. The expert testimony of the type here presented would come somewhere after that. The experts were extremely capable, experienced persons who gave well considered and conscientious expression of their opinions, but nevertheless it remained opinion evidence on a matter of objective facts.

We thus must agree that the trial court was correct in seeking an alternative method to "market price" for establishing the reasonable value of the helium component at the wellhead. It is obvious that the comparable sales-current market price is by far the preferable method when it can be used. However, it cannot be used when the elements necessary for its proper application are lacking. The trial court thus had to resort to a work-back method or price less costs of beneficiation. This was a less desirable method but perfectly valid. Under this method a point was selected where there can be determined an established price and the costs of processing or beneficiation were deducted to move back to the place where the value must be established.

The work-back valuation is well recognized in the production and early processing of natural gas. It is commonly used, according to this record, in placing a value on feed stock for gasoline plants and related processing. There is nothing unusual about the method, it is subject to proof, and can be just as accurate as any other method, but it is more difficult to apply. There is here concerned a single plant constructed and operated for the specific purpose of extracting helium. Other costs, and other elements, can be established. This work-back method was used by the Government and the Court of Claims in making payment to the Navajos for gas supplied to the Navajo Helium Plant. *See Navajo Tribe v. United States*, 364 F.2d 320, 176 Ct.Cl. 502. The Government has used it on other occasions such as for Kerr-McGee royalty payment in Arizona, and under different circumstances. As to the work-back as a method for valuation *see also* Brown, Law of Oil and Gas Leases, § 6.09; *Harding v. Cameron*, 220 F.Supp. 466 (W.D.Okl.); and Sneed, 25 Tax L.Rev. 641. This method to establish value has not only been

used in the petroleum industry, but also in other natural resources cases. *See United States v. Wyoming*, 331 U.S. 440, 67 S.Ct. 1319, 91 L.Ed. 1590; *Black Crystal Coal Co. v. Garland Coal & Mining Co.*, 267 F.2d 569 (10th Cir.); and *Greer v. Stanolind Oil & Gas Co.*, 200 F.2d 920 (10th Cir.). *See also* the gasoline plant case, *Freeland v. Sun Oil Co.*, 277 F.2d 154 (5th Cir.), which is a common use in the industry.

Phillips argues that its right to acquire the helium component was covered by its contracts, and neither the Helium Act nor the Natural Gas Act altered these contracts. Thus there was a Fifth Amendment violation if its property was "given" to another. This court on the *Grounds* case really decided this issue and there would seem to be no need to consider it again other than to state that Phillips acquired the whole stream or production, but has only paid for part. We said in *Grounds*, "In our opinion private contract law and the principles applicable thereto are not controlling." Apparently the Government has yet to pay Phillips for much of it also.

The appellant next argues that the value less expense method was not only inapplicable, but it was improperly applied in that the proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the several factors or elements of the method of valuation.

[3] As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no substantial contrary evidence pre-

sented at trial although on appeal appellants assert deficiencies in the method. This element however was not adequately developed by the proof and further hearing is required on this element.

The appellants also object to the allowance made by the trial court of $2.00 per Mcf for the "treatment" of the "crude" helium sold to it by Phillips (to be incurred by the Government before resale), as insufficient in that it did not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The use of the deduction was proper and appellants have not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the starting figure or element of the value less expense method. This figure was testified to by the witness for the plaintiffs; this price issue was not met by defendant by way of proof. On remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value.

[4] The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program—The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point, and *United States v. Fuller*, 409 U.S. 488, 93 S.Ct.

801, 35 L.Ed.2d 16, which in turn cited *United States v. Cors*, 337 U.S. 325, 69 S.Ct. 1086, 93 L.Ed. 1392. This again concerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. It was a stockpiling of a commercial product. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court allocated part of the plant expense to these liquids as by-products. The evidence is unclear that an increase in the production of liquids would result from the helium plant operation over what had been experienced before and over ordinary extraction plants. Appellants maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extractions. The record shows that increased quantities of wet gas were directed to at least one of the plants, and this could make a difference in the production of liquids, but no figures were produced by defendants. Under this state of the record, we must hold that the trial court did not have adequate data to this element. Different quantities of liquids were produced at different plants, and this may result in different helium values at different plants. In view of the evidence, this was a consequence of the application of the expense element in the formula. However, further evidence on this aspect is needed.

[5] The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base figure for the helium-nitrogen mixture it was buying from Phillips under its contract. This may be a consequence of the decision, but there is no reason why the wellhead price should be determined by the contract price. This payment was not necessarily the "price" of the helium as other considerations were present. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences of the transaction including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. The Government agreed basically to pay Phillips for its interest in the helium and then to pay more if other interest owners established their claims. This has been done, but the price "paid" for all the interests in the helium has not yet been determined. The value here sought to be established is independent of the contract base amount, and is to be of all interests of the proper parties.

We have considered *Lippert v. Angle*, 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof with which we agree, but the case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also Greenshields v. Warren Petroleum Corp.*, 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal question case, relying on our opinion in *Texaco Inc. v.*

Phillips Petroleum Co., 481 F.2d 70 (10th Cir.), which was thereafter reversed by the Supreme Court in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209. That case was concerned only with federal question jurisdiction under 28 U.S.C. § 1331(a), and not whether state or federal law controls. The United States was not there a party. Federal jurisdiction is here conceded.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit, and the Government has asserted a claim or an interest. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all important issues. No relief was sought by Ashland directly against the United States. The trial court found the elements of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was considered in the *Consolidated Helium Cases*, and the arguments were rejected.

[6] As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is apparent that under the contractual arrangement, the United States undertook to pay to Phillips the amounts that Phillips "shall pay" to

other parties for the acquisition of helium in the natural gas above a certain figure. This is in the nature of an indemnity agreement and the contract contains qualifications and limitations not here concerned. The United States is liable for some of the additional amounts which Phillips will have to pay. The Government has thus entered the litigation to assert its own position and interest under the contract. This is initially a matter of dollars, but the Government still has possession of a large part of the helium in question, and this possession can put a somewhat different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie v. Tompkins*. This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir.), and by the record here, the Government in the several cases before this court is faced with claims made by a multitude of interest owners from many states relating to production from Kansas, Oklahoma, and Texas. Each state has somewhat different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838, is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal

relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. Tompkins does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government check, and a delay in notice by the Government to the bank beyond the period contemplated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the laws of any state. In the matter before us, the helium was acquired by the United States by contracts as authorized by federal statutes. This contracting with private enterprise was suggested by statute. As stated by the Court in the cited case, "The desirability of a uniform rule is plain." *See also National Metropolitan Bank v. United States*, 323 U.S. 454, 65 S.Ct. 354, 19 L.Ed. 383, limited by *Bank of America v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93. The War Bond cases in state and federal courts lead to the same result. *See In re Stanley's Estate*, 102 Colo. 422, 80 P.2d 332. The Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956, also indicated a considerable area to be excluded from the application of *Erie*. There an action by the FDIC was brought on a note given to a bank by the defendant, and

the Court applied federal law. Also in the shareholders' liability action in *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv.L.Rev. 976, and 105 U.Pa.Rev. 797.

[7] Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied. The federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366, 63 S.Ct. 573. *See also United States v. Allegheny County*, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In *United States v. Standard Oil Co.*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067, the Court stated that the interests of the Government and its legal relationships may be so determined. The impact of the application of state law upon the governmental interests is a factor of great weight. *See United States v. Mitchell*, 403 U.S. 190, 91 S.Ct. 1763, 29 L.Ed.2d 406.

The Court in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187, considered the application of a Louisiana statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a "choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied

> which would not be wholly in accord with that purpose.' " [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States v. Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests, and said: "The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was efficient and effective. In so doing it set up the contractual barriers between itself and the landowners and gas producers, and also put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and looking at the substance, the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the *Clearfield* doctrine, the trial court was correct in not applying *Erie v. Tompkins*.

[8] We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

[9] The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This determination prevails. The trial court, as to the interest of the landowners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally

between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

[10] The issue of limitations has been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitations have come into play. *See deHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir.). We must conclude that this action has not been barred. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713.

[11] The trial court acted within its discretion under federal law in the allowance of prejudgment interest. *Royal Indemnity Co. v. United States*, 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361; *St. Paul Mercury Indemnity Co. v. United States*, 201 F.2d 57 (10th Cir.).

[12] As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703, a Miller Act case. The opinion includes a direct and intensive consideration of attorney fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' "

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co. See also Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141.

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the value of the helium, as above indicated. The judgment is also set aside as to the valuation determination with direction to hear further the matters or elements of the work-back method, referred to above, wherein there was insufficient evidence in the record.

Thus some elements have been considered in this opinion and ruled on.

On remand the trial court shall also consider whatever other elements that may be developed at further hearing, in making the value less expense or work-back determination.

Thus, we affirm the use of the work-back method of determining value and the use therein of the $2.00 figure for treatment of crude helium. We set aside the values which the trial court determined by the use of the work-back method. On remand the trial court shall give further

consideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method.

We affirm the decision of the trial court that the action is not barred by any statute of limitation and that prejudgment interest may be allowed. We reversed those portions of the judgment that (1) allow attorneys' fees and (2) divide the recovery equally between the lessors and the lessees. The lessors may recover only the amounts determined by the royalty provisions of their leases.

AFFIRMED IN PART, REVERSED IN PART, and remanded for further proceedings in the light of this opinion. Each party shall bear its own costs.

DOYLE, Circuit Judge, dissenting.

I respectfully disagree with the result of the majority opinion and, particularly, that part of it which affirms the trial court's use of the work-back theory or approach in determining a reasonable value for the commingled helium at the wellhead. My disagreement stems from the following: the work-back approach is not the preferred way to determine market value of a commodity; the starting point for determining value is wrong; and the result of its application here is an excessively high price to the government.

Both the government and Phillips Petroleum favor the comparable sales plus expert testimony method; this is the view that I prefer.

I.

WHETHER THE UNITED STATES CONTEMPLATED, AS THE MAJORITY MAINTAINS, THE PAYING OF A SUBSTANTIAL AMOUNT AT A SUBSEQUENT TIME TO LESSEE-PRODUCERS AND LANDOWNERS

I must disagree with the conclusion in the majority opinion that it was within the contemplation of the contracting parties that there would be a large amount paid to interest owners of the commingled helium at some future time. My reasons are as follows:

The Bureau of Mines had entered into contracts for the purchase of extracted helium with four companies, including Phillips, who had possession of the natural gas stream. By so doing the government avoided the necessity for identifying and dealing with all possible interest owners of the helium.

It is true that paragraph 7.4 of the contract with Phillips provided for the partial indemnification of Phillips by the United States for amounts Phillips paid subsequent to the date of the contract for the acquisition of helium in the natural gas or for any interest therein. But to raise the obligation of indemnification, the United States had to consent to the payments or the payments must have been judicially determined or they must have been made in accordance with guidelines established in judicial proceedings. In the Phillips contract indemnification came into being only after Phillips paid in excess of about $3.00 per mcf to third parties for interests in the helium.

The point that is here made is that although the government might have been aware of some indemnification possibility, it did not contemplate the kind of payments

that would be necessary if the work-back method were to be followed in both the *Ashland* and the *Helex* cases.

The findings of the trial court do not support the statement in the majority opinion that it was contemplated by Phillips and the United States that there would ultimately be substantial compensation paid to the interest owners. Memoranda written by the Associate Solicitor of the Division of Mineral Resources, Department of the Interior, and by the chief helium contract negotiator for the Bureau of Mines mentioned the possibility of increased contract prices if the government required the extraction companies to give a warranty of title without some government indemnification for helium payments. But there is no evidence that the original amounts to be paid were simply a down payment. There was no prior experience of paying large sums of money for this helium. Mr. Wheeler of the Bureau of Mines testified that in building the cost model to arrive at a government negotiation position, a $2.00 per mcf amount for the commingled helium had been used because that amount reflected the government's experience in obtaining a supply of helium-bearing gas. It had never paid more than $3.00 per mcf.

The $3.00 per mcf indemnification level was not an arbitrary figure. It represented a ceiling above actual payments on previous occasions. It was an estimation of the probable maximum price that might be paid. Therefore, it is not an established fact that there would be payments in excess of $3.00 per mcf as the majority assumes. Even if some excess above $3.00 per mcf was in the minds of the negotiators of the contracts, it was not any great amount. For example, there is no evidence that it was contemplated that the price would go to $10.30. There was no evidence of a belief that it would exceed $2.00 to $3.00. If it was thought that the $2.00 to $3.00 was just

the beginning, it seems likely that the extraction companies would have not left the remaining amounts up to $10.00 to $14.00 to chance. Their contemplation would in some way have been expressed.

II.

WHETHER THE EVIDENCE OF COMPARABLE SALES WAS, AS THE MAJORITY MAINTAINS, SO LACKING IN PROBATIVE VALUE AS TO REQUIRE THAT IT BE DISREGARDED

The reasons which the majority opinion gives for rejecting evidence of comparable sales for the purpose of establishing reasonable value include, first, that the transactions described by the witnesses which showed comparable transactions or sales were said to be too remote in time or place. The opinion goes on to say that the testimony did not show a free market condition capable of estalishing a usable price.

Secondly, it is said that the helium was part of the gas stream and that this was subject to regulation by the FPC and that this also restricted the opportunities for renegotiation of sales or the negotiation "with new purchases."

The fact that the government was the dominant factor in the market should not, we submit, produce a higher price, for it only tends to show that there was no market for the conservation program gas. Stated differently, there was no demand for it. Where that is the situation, it usually means that it is not worth much. The only reason that it was worth something to the government was because the government had some interest in conserving it. It had some defense projects and space projects in which it might be used and also there is belief by some that in the future

it might be of some value in creating an atmosphere for the performance of special tasks. If, as the opinion states, there is neither demand nor market for this, it would seem reasonable to adopt a pricing policy which gives to the lessee-producers such as Ashland actual cost plus a reasonable profit.

My objection to the work-back method is in its artificiality. Interestingly, it fails to start with real cost figures —its beginning is with opinion evidence given by Mr. Garwin, who was employed as manager of the Kerr-McGee plant. He testified on behalf of Ashland. His opinions were based on the price of *pure* helium sold by the government and private companies. He referred to present sales of pure helium on the private market as being $20.00. The government had charged $35.00 not because this represented a fair price. Rather, the government had no choice since it was required by law to charge that amount. The majority apparently has questions about the validity of the $20.00 starting point. It does not give a reason for its dissatisfaction. My objection is its gross excessiveness and its lack of reality.

Moving backward from a $20.00 price for pure helium to the cost of the gas purchased by the government, which was not pure helium but was composed of about 50 percent helium and 50 percent nitrogen, deductions for the cost of extracting helium were made. The end result is prices ranging from $11.76 to $16.98 per mcf for the years 1963-71. The government has already paid to Phillips $10.30 per mcf which includes the cost to Phillips of building an extraction plant. Inasmuch as the government is obligated to indemnify Phillips for all sums exceeding $3.00, this means that the difference between the $11.76 to $16.98 figures and the $3.00 indemnification threshold will in all probability be paid in addition by the government.

The trial court and the majority opinion here made no effort to isolate a rule or procedure to ascertain actual market value either from the standpoint of comparable sales or original cost or reproduction cost. It gave its full and exclusive blessing to the work-back theory. The legal objection to this is its secondary evidentiary character. It is secondary because it is called into use only if it is impossible to ascertain actual market value, from comparable sales, for example. It would have been valid to have used it for comparison purposes, that is to test and to compare the validity of the price arrived at by some other more accepted method, but this has not been done. We find them embracing it wholly and completely. This was not justifiable since there was evidence of comparable sales either at the wellhead or at the inlet of the plant.

It is more specifically objectionable because of the $20.00 starting point. If they were going to select a stage in the process and deduct costs in order to arrive at the selling price at the wellhead or at the plant inlet, they should not have started with a product which has nothing whatever to do with this case, that is they should not have attempted to discover a price for pure helium. Instead they should have looked to prices of conservation helium gas with 50 percent helium content and the remainder nitrogen, for this is the product that is sold to the government. The beauty of starting with crude conservation helium is that they had a demonstrable sale in front of them and that is the sale from Phillips to the government for the sum of $10.30 for conservation helium. From this point it would only have been necessary to deduct the costs of extraction and of transportation from the wellhead to the extraction plant. Had they done this they would have come up with a price close to $3.00. It could be more or less. For comparison purposes they could look at

the actual sales at the wellhead or at the plant inlet and this would have given them a true picture. It is worthy of note that this is exactly what Judge Brown did in the *Helex* cases, and his result is realistic and reliable. Judge Brown, needless to say, did not accept the work-back theory as an exclusive formula.

In the cases which have used the work-back method, I find that in each instance the court started out with a clearly supported market price and not a contrived one—a price well established in a *real* market for the specific commodity to be valued—*or* with proceeds from the actual sale of the commodity at some later point in its processing. *See Freeland v. Sun Oil Company*, 277 F.2d 154 (5th Cir. 1960); *Black Crystal Coal Co. v. Garland Coal and Mining Co.*, 267 F.2d 569 (10th Cir. 1959); *Greer v. Stanolind Oil and Gas Co.*, 200 F.2d 920 (10th Cir. 1952). *See also Stafos v. Missouri Pacific Railroad Co.*, 367 F.2d 314 (10th Cir. 1966).

This court in *United States v. Sowards*, 370 F.2d 87, 91 (10th Cir. 1966), showed that no one method need be exclusive unless it clearly establishes the price. It pointed out that the federal concept of market value is closely related to selling price on the market and that the best evidence is comparable sales even though the determination is not limited to that method. It approved the use of other data where there are no comparable sales and noted that in condemnation cases market value may also be based upon reproduction costs or capitalization of net income or an interaction of these methods together with comparable sales. It said that all of this must look to what a willing seller would sell for and a willing buyer would pay. The *Sowards* decision nevertheless showed a preference for comparable sales. On the other hand, the work-back method is to be resorted to only where everything else fails.

In summary, then, it was wrong to adopt the work-back method as an exclusive one. It was wrong to start at the point where the trial court started and, of course, the result is an untenable one because it unnecessarily produces an excessive price.

What about the comparable sales which the majority opinion condemns?

We must bear in mind that the contracts entered into by the government looked to prices in 1961. The Keyes plant was cited for example and this involved purchases of gas by the government in 1958 at prices approximating $2.00 per mcf at the extraction plant inlet. The production costs were about $15.50 per mcf, but the basic interest of the seller was to make residue gas marketable by raising the BTU content. This was the approach that was used in the Otis plant also. It was seeking to upgrade gas for fuel purposes.

I would submit that the fact that there was this kind of motivation does not outlaw the comparable sales evidence. Removal of helium as an aid to the heating quality of the gas ought not to render the evidence of the sale noncogent.

The purchases of the government plants at Navajo, Exell, Otis and Cunningham are said to be out of time because they occurred in 1945 during the War. They are hardly more remote from 1961 than are the sales cited by Mr. Garwin, that is the $20.00 sales which occurred in relatively recent times. There were also purchases of helium-bearing gas for the Navajo plant in 1955, 1959, and 1962; all at about $2.00 per mcf for helium content at the plant inlet.

The gas sales agreement between Colorado Interstate and Alamo Chemical Company, a Phillips affiliate, which

were at $2.00 per mcf, does not appear to be out of line. The 1945 Navajo sales just referred to were determined by the Court of Claims to have a value of $2.99 per mcf. The fact that they occurred in 1945 could be taken into account, but this is a two-edged sword because there was some actual demand for this gas during the World War II period.

I am not saying that the comparable sales should be accepted as gospel. This does not mean, however, that we should bury our heads in the sand to them. We can at least view them without fear of being contaminated. The probative value of actual sales is that they provide a more rational and realistic view of value than does some theoretical approach such as the work-back approach because these are actual demonstrations. The majority opinion does not tell us where the social or other value is in the work-back theory. As suggested before, it might be palatable if actual cost figures were used in arriving at a starting point. It is, however, lacking in palatability when the opinion of the chief witness for Ashland that $20.00 is a fair price for pure helium is accepted completely as the starting point for a work-back process.

The foregoing is important because we are dealing not with $100,000 or even a few million. Ultimately if the work-back formula is used this could mean—and we consider not only this case but its companion, the *Helex II* cases which have yet to be handed down but which are likely to follow this same formula—hundreds of millions of additional dollars to be paid by the government for a commodity which at best has an uncertain value now and which does not promise to have any added value in the future.

III.

WHETHER TODAY'S DECISION WILL RESULT IN THE GOVERNMENT'S BEING COMPELLED TO PAY AN UNREASONABLY HIGH PRICE, AN AMOUNT WHICH IS BEYOND THE MARKET VALUE OF THE HELIUM GAS

What would be the effect if the work-back method were applied to the *Helex II* cases?

Most of the helium in the United States occurs in Kansas, Oklahoma and Texas. It is not surprising, therefore, that the companion case to this present one, the so-called *Helex II* cases, arose in Kansas. The enormity of the occurrence was probably responsible for the helium conservation progam in the beginning. These Kansas cases have been before this court previously. They were filed in 1964. The first one was decided at trial in 1968. It is reported at 292 F.Supp. 619. That decision was reviewed by this court in 1971. *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704. This initial case was primarily concerned with title to the helium. Following remand, trial was had in order to determine value. As in the instant case, the government had already paid a substantial amount, about $12.00 per mcf, which purported to represent the cost of the extraction plants as well as the cost of the helium. The action was in interpleader. Its purpose was to determine the value of the helium and hence the obligation, if any, of the government or a party to pay additional amounts. At the trial evidence of comparable sales was not dissimilar to the evidence offered at the *Ashland* case. There was a difference. A good deal of opinion and interpretative evidence was offered on behalf of the government. In sum, the government presented a real case in this instance—a much stronger case than was brought forth in *Ashland*.

The trial court's findings were much different. Utilizing the comparable sales, and the opinion evidence, the trial court found that the value of helium at the wellhead was $.60 to $.70 per mcf. As a result, the government was not required to pay any more than the $12.00 which it had paid for the gas at the well plus extraction expense including building a plant. This was because the value found was less than the $3.00 amount beyond which the government was required to indemnify. The additional amount, $.60 to $.70, had to be paid by the Helex companies to the lessee-producers.

If the formula approved in the present case were to be applied to the *Helex* cases there may be a far different result. I am not saying that it will. I do not know. The trial record is superior in the *Helex* cases and this could change it. On the other hand, the work-back doctrine is firmly adopted. If this present *Ashland* ruling becomes a precedent for the upcoming *Helex II* cases, the result could be a disaster to the government in that it could virtually double its cost. The price could go from $12.00 (the amount already paid and which under the *Helex* trial court's decision is the entire sum), to as high as $26.00.

The *Ashland* case is in sharp contrast. The trial court, as we already know, employed the work-back method in arriving at values of commingled helium. The prices which it adopted were $11.76 to $16.98 per mcf for the years 1963-72. This was in addition to the $10.30 already paid by the government to Phillips to cover the total cost of extraction plus cost of gas at the well. The majority opinion in this case gives restricted approval to the work-back method. It remands for additional proceedings to reconsider three factors used. In remanding the case the majority opinion has not, as we have also noted, given the trial court any guidance as to what is sought and as to how these factors are to be determined. Therefore,

the outcome of the remand as it effects the values in the *Ashland* case cannot be anticipated. These values may be lower or they could just as easily be higher. Thus, both the viewpoint and the result in *Ashland* are entirely different from the approach and result in the *Helex II* cases. That is why I am apprehensive as to possible results in the *Helex* cases when the court gets around to applying the work-back theory as now enunciated.

We are mindful that the government has already paid the extraction companies a total of about $12.00 per mcf for the 36,500,000 mcf's of crude helium in *Helex*. This is a sum of about $438 million for helium which has been purchased and which has been stored under the conservation program. We cite it to show the magnitude of this purchase and the extent to which the government would be called upon to indemnify if the work-back method were to be applied in the *Helex II* cases. If the pattern of the present case continues, there could be additional payment of from $9.00 to $12.00 per mcf. It remains to multiply 36,500,000 mcf by the $9.00 or $12.00 addition in order to view the dismal news.

I submit that the Helex II cases ought to have been the precedent and the model rather than the *Ashland* case.

* * *

Finally, this entire helium conservation program is affected with a public interest. As the majority notes, there is no competition to provide low prices. It is a monopoly condition and the determination of reasonableness of prices has devolved on the courts. The court should, of course, see to it that the companies involved in the production of the helium receive fair compensation. Fair compensation does not mean that the participants should receive profits of the possible magnitude indicated here.

APPENDIX T

Opinion of the United States District Court for the Northern District of Oklahoma, Ashland Oil, Inc. v. Phillips Petroleum Company, Dated August 31, 1973 (364 F.Supp. 6)

ASHLAND OIL, INC., Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant.

and

United States of America, Intervenor.

No. 67-C-238.

United States District Court,
N. D. Oklahoma.

Aug. 13, 1973.

As corrected Aug. 31, 1973.

Action by seller of natural gas to recover reasonable value of helium extracted by purchaser and sold to United States. The District Court, Bohanon, J., held that seller was entitled to recover reasonable value of gas plus interest and attorney's fees, and that royalty owners were entitled to one-half the value less one-half of expenses.

Order accordingly.

1. Gas (Key) 14.6

Evidence established that United States which contracted with natural gas purchaser for purchase of helium extracted from natural gas stream confiscated helium belonging to natural gas seller and was required to pay reasonable value of helium in excess of price specified

in contract with natural gas purchaser. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 2 et seq., 50 U.S.C.A. § 167 et seq.

2. Gas (Key) 14.6

Seller of natural gas to purchaser which extracted helium and sold same to United States was entitled to interest on reasonable value of helium taken. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 2 et seq., 50 U.S.C.A. § 167 et seq.

3. Federal Civil Procedure (Key) 2737.5

Natural gas seller which successfully prosecuted suit to recover reasonable value of helium extracted by natural gas purchaser from natural gas stream and sold to United States was entitled to be paid for reasonable attorney's fees incurred. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 2 et seq., 50 U.S.C.A. § 167 et seq.

4. Mines and Minerals (Key) 70(2)

Royalty owners were entitled to one-half of the proceeds derived from sale of helium less one-half of expenses incurred by seller of natural gas in prosecuting suit against purchaser which extracted helium and sold same to United States. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; Helium Act Amendments of 1960, § 2 et seq., 50 U.S.C.A. § 167 et seq.

Gerald Sawatzky and Stanley G. Andeel, Wichita, Kan., Jay W. Elston, of Fulbright, Crooker & Jaworski, Houston, Tex., and John M. Imel, of Martin, Logan, Moyers, Martin & Conway, Tulsa, Okl., for plaintiff.

Richard B. McDermott, of Boesche, McDermott & Eskridge, Tulsa, Okl., and Don L. Jemison, Phillips Petroleum Co., Bartlesville, Okl., for defendant.

Floyd L. France and Dennis A. Dutterer, Dept. of Justice, Washington D. C., and Nathan G. Graham, U. S. Atty., Tulsa, Okl., for intervenor.

OPINION

BOHANON, District Judge.

This action was initially instituted in the United States District Court for the Southern District of Texas, and was later, by proper proceedings transferred to this Court for trial and disposition. Ashland Oil and Refining Company (hereinafter referred to as Ashland) originally claimed the right to recover moneys from Phillips Petroleum Company (hereinafter referred to as Phillips) representing an alleged deficiency in payments for sale of natural gas under the jurisdiction of the Federal Power Commission. Ashland also asserted claims against Phillips to be paid for helium contained in the jurisdictional mass of natural gas, and which was extracted from the natural gas stream by Phillips under contract with the United States of America through the Department of Interior, Bureau of Mines.

The Court has diversity jurisdiction and federal question jurisdiction, 28 U.S.C.A. §§ 1331(a) and 1332.

Ashland abandoned its claim against Phillips for deficiency payments for sale of natural gas under the jurisdiction of the Federal Power Commission by reason of proceedings before the Federal Power Commission, and an appeal from its order (Ashland Oil and Refining Company v. FPC, 421 F.2d 17, 6th C.A.). Consequently, the only claim remaining for trial and determination by this

Court is Ashland's claim for recovery of the reasonable value of helium contained in the natural gas stream delivered by Ashland to Phillips.

Plaintiff Ashland acquired all of the interests of United Producing Company which had entered into a contract with Phillips Petroleum Company on November 8, 1945 (amended Oct. 1, 1950 & June 27, 1956) providing for the sale of natural gas from 15 wells located in Sherman County, Texas. These same parties entered into another gas purchase agreement on April 15, 1953, (amended June 27, 1956) providing for the sale of natural gas from three wells in Hansford County, Texas. These agreements were properly filed with the Federal Power Commission as provided by law and rate schedules were fixed for the sale of said gas. These filings were required under the Natural Gas Act (15 U.S.C. § 717 et seq.) because Ashland's deliveries to Phillips constituted sales of natural gas for resale in interstate commerce. Ashland succeeded to all the rights and interest of United Producing Company. All of the wells above referred to are subject to the contract between Ashland, as successor to United Producing Company, and Phillips Petroleum Company, and Phillips Petroleum Company extracted helium which was contained in the natural gas stream as delivered by Ashland to Phillips.

Ashland's contention is that the title to the helium in the contained natural gas did not pass to Phillips under the gas purchase contracts and if and when Phillips elected to extract the helium from the natural gas stream, plaintiff Ashland was entitled to payment therefor from Phillips for the reasonable value of such helium less certain costs of extraction, and other deductions hereafter referred to.

The defendant contends that when it purchased the gas stream from Ashland, it purchased all of the elements thereof including the helium, and inasmuch as Phillips paid Ashland the Federal Power Commission rate for the gas delivered to Phillips, Phillips became the owner of the entire stream, including the helium, and therefore, is not liable in any sum to Ashland for the helium extracted. Further, Phillips presents the defense of Statute of Limitations claiming that if liable, they are liable only for the helium extracted from the natural gas for two years prior to the filing of this action and thereafter; further Phillips claims that by reason of payment to Ashland for the natural gas, plaintiff is barred by the defenses of accounts stated, accord and satisfaction, and to require payment now would be a violation of the Fifth Amendment to the Constitution of the United States.

The United States of America by Order of the Court was realigned as a party defendant.

Findings

1. Helium is an unusual element; it is a gas which is inert and noncombustible and is the second lightest element known. Helium is so inert that it will not chemically react or combine with other elements and thus remains as helium forever. It is tasteless, colorless, odorless and invisible. For a more complete description of helium, its unusual characteristics, its uses, and where found, etc., see Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10 C.A.) and in the Opinion of District Judge Wesley E. Brown, 292 F.Supp. 619 (D.C.Kan.).

2. The United States of America, through the Department of Interior and the Bureau of Mines of the Department, recognizing the need for the conservation of this

rare material and its scarcity, and its need for defense purposes and other important uses, Congress enacted the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) authorizing the United States to enter into a program of conservation of helium for future use; under this program, private companies negotiated contracts with the United States of America through the Department of Interior, Bureau of Mines, to construct plants for the extraction of helium from natural gas streams, then being produced from the Hugoton-Panhandle area; otherwise, this valuable material would be lost at the burner tip of the ultimate user of the gas and discharged into the air as residue.

3. Prior to 1961, the United States Government, with minor exceptions for a short time, was the sole extractor and source of commercial helium. It controlled and fixed the price of all wholesale sales of helium.

4. Pursuant to the authority granted by Congress, the United States entered into five long-term helium purchase contracts with four companies, one of which was Phillips Petroleum Company, which contracted on November 13, 1961, with the United States to sell a helium gas mixture from two plants it proposed to build, the Sherman Helium Plant and the Dumas Helium Plant. These plants were constructed so as to extract for delivery and sale to the government a helium gas mixture (crude helium) which was to consist of at least 50% helium under the contract requirements, the remainder being essentially nitrogen. Under this contract, the United States agreed to pay a base price of $10.30 per m. c. f. (thousand cubic feet) of contained helium in the crude product, which price was subject to escalation in accordance with the contract. The base price was also subject to escalation in the event Phillips was required to pay third parties "for the acqui-

sition of helium."[1] Specifically, under the contract between the United States and Phillips, producers of commingled helium such as Ashland and the mineral or royalty owners, being third parties, and if they were entitled to recover from Phillips the reasonable value of the helium produced from the commingled gas Phillips was required to pay under paragraph 7.4 of the contract, part 2 of the unit price only approximately $3.00 per m. c. f. and the United States under the contract was required to reimburse or indemnify Phillips for any excess of $3.00 per m. c.f. which Phillips was required to pay. This was an important part of the contract because it indemnified Phillips against required payments to third persons of the amount in excess of $3.00 per m. c. f. and thus gave the United States the right to purchase this helium for a lesser sum than, no doubt, otherwise would have been required.

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1. "In addition to all other amounts payable under this contract Buyer shall pay to Seller all amounts, except as hereinafter provided, that Seller shall pay subsequent to the date of this contract, directly or through an affiliated company, to parties other than itself or an affiliated company for the acquisition of helium in the natural gas, as defined herein, or for any interest in such helium. Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer; and for the purposes of this paragraph 7.4 Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state. Further, Buyer shall be deemed to have consented to any and all such payments under circumstances similar to any such judicially determined claim if such payments are made generally in accordance with the findings, principles, and conclusions of any such judicial determination. The amounts that Buyer shall be required to pay to Seller in accordance with this paragraph shall not include an amount to be calculated applicable to each such acquisition equal to twenty-nine (29) per cent of the weighted average of part two of the unit price or unit prices in effect during the time covered by such acquisition multiplied by the volume in MCF of helium in the natural gas, as defined herein, covered by such acquisition."

5. The United States took delivery of the helium gas mixture from Phillips and transported it through its own pipeline to storage in government-owned storage facilities at Cliffside Field near Amarillo, Texas. From there it can be withdrawn as needed, and purified to grade A helium (99.995% pure helium) in government-owned plants at approximately $2.00 per m.c.f. helium.

6. Under the contracts the government agreed to take all of the helium produced up to certain amounts, and the government sold grade A helium at wholesale F.O.B. its helium plants for $35.00 per m.c.f. and has done so since the fall of 1961. All federal departments and agencies were required to purchase their helium needs from the United States at this price. The Bureau of Mines has the statutory authority and responsibility to fix the price at whatever level is necessary to pay for costs associated with the helium conservation program, including any additional payments which may be required to be paid by the United States as a result of this case.

7. Beginning in 1961, several private helium plants have been built to sell pure helium in the private commercial market. Although the government price for its helium has remained at $35.00 per m. c. f., the prices for which helium has sold on the private market from 1963 through 1972 have ranged from $35.00 to approximately $20.00 per m. c. f. Such prices are wholesale prices and the only market prices for sale of helium in the United States during the period in question.

8. The Court finds the fair and reasonable value of grade A helium during the periods here involved was $20.00 per m. c. f.

9. Recognizing the benefit to United States and the importance of paragraph 7.4 of the United States-Phillips helium contract, the Associate Solicitor of the Division of

Mineral Resources of the Department of the Interior, and who approved the contract provision, correctly described it as an escalation in price:

> "This provision in effect provides for escalation in price when the cost of the raw material increases." (Pls. Ex. 39, p. 3)

10. By reason of the above escalation provision in the contract, the United States was able to obtain a base price substantially lower than would otherwise have been possible.

11. There was no known wellhead price fixed for the helium gas in the gas stream, and it was and is impractical and uneconomical to attempt to extract the helium gas at the wellhead. This can only be done economically through large plants with large volumes of gas to process.

12. The gas stream delivered by Ashland to Phillips contained all of the natural gas liquids, such as butane, propane and pentanes plus, which Phillips extracts and did extract from the feed gas and markets these gases in liquid form. Because these rich liquids are in concentrated form (about 10% of the volume of the total feed gas stream), Phillips has been able to extract and market substantial additional quantities of such liquids, above and beyond what its existing gasoline plants would be able to extract at a substantial savings in cost. These additional liquids are in substance a by-product of the helium plant operation.

13. Experts who testified in the trial of this case estimate that the Texas Panhandle, Southwestern Kansas and Western Oklahoma constitute 99% of the free world's known commercial reserves of helium. This area is known as the Hugoton Field, and Ashland wells which deliver gas to Phillips are in this field.

Reasonable Value Calculations

	A	B	C	D	E
	Helium Plant Costs (Plt's Ex. 61 & 62, line 10)	Liquid Benefit Credit (Plt's Ex. 61 & 62, line 12)	Net Helium Cost (Columns [a] less [b])	Minimum Value for Crude Helium $20.00 Grade A Helium Value less $2.00 / mcf Purification Cost	Reasonable Value of Helium Delivered by Ashland to Phillips (Columns [d] less [c])
			SHERMAN HELIUM PLANT		
1963	$4.82	$1.01	$3.81	$18.00	$14.19
1964	3.53	.10	3.43	18.00	14.57
1965	4.06	.27	3.79	18.00	14.21
1966	4.09	.45	3.64	18.00	14.36
1967	4.94	1.06	3.88	18.00	14.12
1968	4.22	1.16	3.06	18.00	14.94
1969	4.50	.82	3.68	18.00	14.32
1970	5.16	2.20	2.96	18.00	15.04
1971	5.31	4.29	1.02	18.00	16.98
1972	5.52	3.97	1.55	18.00	16.45
			DUMAS HELIUM PLANT		
1966	5.93	.00	5.93	18.00	12.07
1967	6.46	.78	5.68	18.00	12.32
1968	5.91	1.01	4.90	18.00	13.10
1969	6.55	.31	6.24	18.00	11.76
1970	5.89	1.04	4.85	18.00	13.15
1971	6.39	1.58	4.81	18.00	13.19

14. To arrive at the reasonable wellhead value of Ashland's helium delivered to Phillips, there should be deducted from the value those costs incurred by Phillips in extracting and delivering the helium and also the cost of purification. In determining these costs, the total costs of the helium plant itself should be credited and reduced by a fair allocation of a portion of such costs to the incremental, or additional liquids, which the helium plant generates. This can equitably be done by calculating a fair share of the incremental benefits accruing to Phillips in its natural gas liquids operation as a direct result of the helium plant operation. Failure to assign a portion of helium plant costs to the incremental liquids operation would inequitably burden the helium plant with substantial costs which are incurred and which result in the production of the incremental liquids.

15. After allowing for the following deductions, the Court finds that the reasonable value of the helium delivered by Ashland to Phillips is shown in the following table. The deductions referred to include:

(a) All helium plant costs, including a 10% rate of return to Phillips on its stockholder equity;

(b) The incremental liquids benefit which should be applied to reduce costs of the helium plant;

(c) $2.00 per m. c. f. for purification.

16. The Court finds and is of the opinion that the following table shows the reasonable cost of extracting the helium, the reasonable value of helium on a yearly basis from the Ashland gas delivered to Phillips and further shows the volume of helium per m. c. f. extracted by Phillips for the ten year period in question and the total value thereof; likewise it shows the interest computed at 6% per annum for the total recovery of helium delivered by Ashland and recovered by Phillips and the total amount of money judgment plaintiff is entitled to recover:

Reasonable Value Calculations—Continued

	F	G	H	I	J
	Vol. of Ashland Helium Extracted by Phillips (Plt's Ex. 14 & 15, Sch. 3)	Total Reasonable Value of Ashland Helium Extracted by Phillips Awarded to Ashland	Periods (Yrs.) at Interest to July 1, 1973	Interest at 6% per year	Total Recovery By Ashland
			SHERMAN HELIUM PLANT		
	m.c.f.				
1963	7,791	$110,554.29	9½	$63,015.95	$173,570.24
1964	8,076	117,667.32	8½	60,010.33	177,677.65
1965	8,997	127,847.37	7½	57,531.32	185,378.69
1966	7,521	108,001.56	6½	42,120.61	150,122.17
1967	5,757	81,288.84	5½	26,825.32	108,114.16
1968	6,742	100,725.48	4½	27,195.88	127,921.36
1969	6,033	86,392.56	3½	18,142.44	104,535.00
1970	5,460	82,118.40	2½	12,317.76	94,436.16
1971	5,944	100,929.12	1½	9,083.62	110,012.74
1972	6,082	100,048.90	½	3,001.47	103,050.37
			DUMAS HELIUM PLANT		
1966	431	5,238.38	6½	2,042.97	7,281.35
1967	950	11,704.00	5½	3,862.32	15,566.32
1968	949	12,431.90	4½	3,356.61	15,788.51
1969	890	10,466.90	3½	2,197.94	12,664.34
1970	681	8,955.15	2½	1,343.27	10,298.42
1971	444	5,856.36	1½	527.07	6,383.43
				TOTAL	$1,402,800.91

17. The Court finds that the attorneys for plaintiff have expended many hours prosecuting this lawsuit against the defendant and are entitled to be paid the total attorneys fees as set out below.

Jay W. Elston firm	1059 hours at	$50.00	$ 52,950.00
Houston, Texas	1059 hours at	$35.00	37,065.00
Gerald Sawatzky firm	550 hours at	$50.00	27,500.00
Wichita, Kansas	275 hours at	$35.00	9,625.00
John M. Imel firm	201.4 hours at	$50.00	10,070.00
Tulsa, Oklahoma		TOTAL	$137,210.00

The Court finds that the plaintiff Ashland should have judgment against the defendant Phillips for attorneys fees in the total amount of $137,210.00 for the services as above specified.

18. The Court finds that Ashland has prosecuted this lawsuit for the total helium contained in the gas stream from its respective gas wells delivered by Ashland to Phillips; that in prosecuting this lawsuit the plaintiff Ashland has incurred and paid the following expenses which are not chargeable to the defendant Phillips, but were reasonable and necessary and should be paid on the basis of one-half by Ashland and one-half by the landowners, mineral owners, otherwise royalty owners.

WITNESS:

Lee Garvin
326 Oklahoma Mortgage Bldg.
Oklahoma City, Oklahoma

Professional Services	1969:	$ 2,810.40	
	1973:	7,260.95	$10,071.35

Troupe, Kehoe, Whitaker & Kent
Certified Public Accountants
2900 Power & Light Bldg.
Kansas City, Missouri

Professional Services	$24,600.00	
Travel Expenses	1,353.73	
Duplicating	425.00	$26,378.73

Tulsa Reporting Service
526 Mayo Building
Tulsa, Oklahoma

Depositions: May, 1973	$ 277.15	
Transcript: June, 1973	4,686.00	$ 4,963.15

Interrogs, Inc.
2439 Bank of the Southwest Bldg.
Houston, Texas 77002

Depositions: April, 1973	$ 552.00	$ 552.00

Fulston, Siefkin, Powers & Eberhardt
Suite 600
4th National Bank Bldg.
Wichita, Kansas

	1968	1972	1973	
Travel	$157.12		$3,028.25	
Long Distance		$6.99	239.34	
Court Reporting				
Depositions			2,385.30	
Postage		.98	19.21	
Duplicating			434.40	
TOTAL	$157.12	$6.97	$6,106.50	$ 6,270.59

Martin, Logan, Moyers, Martin & Conway
National Bank of Tulsa Bldg.
Tulsa, Oklahoma

Expenses: (7-1-69 thru 12-31-72)		
Duplicating	$ 3.90	
Long Distance	56.81	
Travel	14.40	$ 75.11

Ashland Oil, Inc.
Employee Travel Expense

	1972	1973	
Ray Althouse		$169.50	
J. C. Coogan		160.23	
B. J. White		101.02	
D. W. Cox	$179.03	405.66	
	$179.03	$836.41	$1,015.44

WITNESS:—Continued

Fulbright, Crooker & Jaworski
Bank of the Southwest Bldg.
Houston, Texas

	1966	1967	1968	1969	1970	1971	1972	1973
Long Distance	85.79	283.96	56.38	275.71	13.20	61.59	141.86	195.52
Duplicating	70.76	294.20	550.45	1,105.01	21.00	18.00	214.32	160.30
Filing Fees		25.00		15.00				
Travel		303.72	114.24	1,341.17	126.00	120.50	1,327.77	1,283.63
Printing				1,879.01	89.82			
Freight				11.30				
Secretarial				80.88			15.92	
Total	156.55	906.88	721.07	4,708.08	250.02	200.09	1,699.87	1,639.45

Total Expenses	$10,282.01	
Less Amounts Incurred in Connection with FPC Proceedings	1,922.89	$ 8,359.12
TOTAL OF ALL EXPENSES INCURRED		$57,685.49

The Court finds that the Plaintiff expended $57,685.49 in the prosecution of this lawsuit which is not assessable or taxable as costs against the defendant, Phillips, and that these costs should be divided equally between plaintiff and landowners, mineral owners (hereinafter referred to as royalty owners), and from the distribution made by plaintiff, Ashland, to royalty owners first should be deducted one-half of the cost above stated as paying the cost assessable to royalty owners.

19. The Court finds from a review of the pleadings, the Complaint, Amended Complaint, Stipulation of Facts, the exhibits and testimony that Ashland has brought, prosecuted and maintained this action on its own behalf and on the behalf of the royalty owners for the delivery of helium in the entire gas stream on a per well-head basis from the inception of the production of helium to June 30, 1972. The Court takes judicial knowledge of the oil and gas leases executed by royalty owners in favor of the lessee and the assignee of the lessee, and that at the time of entering into each of the respective oil and gas leases, no thought of helium rights was considered by either lessee or lessor; that no consideration passed from one to the other for any helium rights; that the helium as contained in the gas was an undealt with commodity except that the lessee had the exclusive right to enter upon lessor's property and drill and produce gas from said premises; that the exclusive right to drill and produce gas is a perpetual right vested in the lessee so long as oil and gas is produced in paying quantities from the premises by Ashland or its assigns.

The Court finds that the helium hereinabove referred to is and was the sole property of the royalty owners subject to the exclusive right of Ashland to drill and produce gas which contained helium and that their rights

are equal and that the proceeds to be derived from the sale of helium should be equally divided between Ashland and the royalty owners and therefore the judgment herein rendered in favor of the plaintiff, Ashland, and against the defendant, Phillips, should be divided equally between Ashland and the royalty owners and on the basis of the payments heretofore made by Ashland to the royalty owners for gas produced and sold to Phillips and transported in interstate commerce under the regulations of the Federal Power Commission; and that Ashland shall first deduct from the royalty owners' portion of the judgment one-half of the costs of prosecuting this action. The equal division between lessor and lessee of the proceeds from the helium is required in equity; otherwise the windfall would give 7/8 to Ashland and 1/8 to the royalty owners, which would be unconscionable and an unjust enrichment to Ashland.

Conclusions of Law

This litigation is based primarily on the 1960 Act of Congress known as the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) where the United States was authorized and directed to enter into a program of conservation of helium for future use.

[1] The evidence is convincing to this Court that the United States, through the defendant, Phillips, and by reason of the Helium Act, confiscated the helium of the plaintiff and royalty owners rather than acquiring it by condemnation; nevertheless, the taking was in the nature of condemnation, and the reasonable value of the helium plus interest is proper; that the United States was obligated to pay the reasonable value of said helium in excess of $3.00 per m. c. f. which Phillips was required to pay for the helium all as provided by their contract.

The Court concludes that the law contained in Northern Natural Gas Co. v. Grounds, *supra* governs this case in the matter of reasonable value of helium and the obligation of the defendant to pay that value, and no other authorities need be cited.

Further the United States Court of Appeals for the Tenth Circuit laid down certain guidelines for trial courts in Texaco Inc. v. Phillips Petroleum Company, 481 F.2d 70 (opinion filed July 13, 1973). Here the Court said:

> "We have here another controversy over helium. The basic background is outlined in our decision in the Consolidated Helium cases. See Northern Natural Gas Company v. Grounds, * * *. We there held that lessee-producers of natural gas could recover the reasonable value of contained helium out of interpleader funds created by the government's purchases of helium from helium extraction companies and parent pipeline companies.
>
> * * *
>
> In Consolidated Helium we considered the claims of the pipelines and helium separation companies that they were entitled under their gas purchase contracts to receive the entire gas stream at the Federal Power Commission service rate and said that *'private contract law and the principles applicable thereto are not controlling.'* (Emphasis Added)
>
> * * *
>
> No good purpose would be served by repeating our analysis of the Natural Gas Act and the 1960 Helium Act amendments. We held that, * * *
>
> > '* * * * the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the

conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants.'

* * *

We thought that we made plain that we did not allow recovery on the application of any principles of equity, see 441 F.2d at 719-720, but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate.

* * *

We reject defendant's assertion that Consolidated Helium was an interim decision. The Supreme Court denied certiorari, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267, 404 U.S. 1063, 92 S.Ct. 732, 30 L.Ed.2d 751, and 404 U.S. 1065, 92 S.Ct. 732, 30 L.Ed.2d 754. The decision is final and is the law of this circuit. We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits.

* * *

In Consolidated Helium we pointed out that there are over 30,000 persons receiving income from helium bearing natural gas produced by over 500 lessee-producers under thousands of leases.

* * *

The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe the federal courts have jurisdiction under 28 U.S.C. § 1331(a)."

[2] The Court concludes as a matter of law that the plaintiffs are entitled to a legal rate of interest because of the taking. See St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (C.A. 10); T. & M. Transp. Co. v. S. W. Shattuck Chemical Co., 158 F.2d 909 (C.A. 10); Louisiana & Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311 (C.A. 5); Jacobs v. United States, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933).

The Court in Northern Natural Gas Company et al. v. Grounds et al., 441 F.2d 704 (10 Cir.), cert. denied, 404 U.S. 1063-1065, 92 S.Ct. 732, 30 L.Ed.2d 751, issued a post-opinion order, pertaining to costs and the mandate, recognizing the significance of the interest question. Paragraph 15 of the Order dated March 16, 1972, states:

> "The right of the lessee-producers to interest, and the amount thereof, on any sums which the District Court may adjudge to be due and owing to them shall be determined by the District Court, subject to review by this Court."

[3] The Court concludes as a matter of law that the plaintiff's attorneys are entited to be paid by the defendants a reasonable attorneys' fee. See United States Fidelity & Guar. Co. v. Hendry Corporation, 391 F.2d 13 (C.A. 5); Boyd Callan, Inc. v. United States, 328 F.2d 505 (C.A. 5).

In T. F. Scholes, Inc. v. United States, 295 F.2d 366 at 370 (C.A. 10) the Court said:

> "The fixing of reasonable attorneys fees rested in the sound judicial discretion of the court. . . ."

In Texas Gas Corporation v. Hankamer, 326 S.W.2d 944 (Tex.Civ.App.) it was held that gas and distillate delivered by appellees and processed in a plant was "material furnished", and an award of attorneys' fees was upheld.

The Court concludes as a matter of law that the plaintiff is entitled to judgment as follows:

(a) That plaintiff, Ashland, should have judgment against defendant, Phillips, for helium extracted for the ten-year period from 1963 to December 31, 1972, together with yearly interest thereon at the rate of 6% per annum ending June 30, 1973, in the total amount of $1,402,800.91.

(b) That plaintiff should have judgment for attorneys' fees, otherwise professional services rendered by plaintiff's attorneys in the prosecution of this action in the amount of $137,210.00.

[4] (c) That the royalty owners should be paid one-half of the proceeds derived from the sale of helium less one-half of the expenses of $57,685.49 incurred and paid by Ashland in the prosecution of this action and not chargeable to the defendant Phillips.

(d) That the prayer of the Intervenor United States of America is denied.

An appropriate judgment will be entered as herein provided

JUDGMENT

Based upon the Memorandum Opinion, Findings of Fact and Conclusions of Law filed herein this day, the Court enters the following judgment:

1. It is ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc., shall have judgment against defendant Phillips Petroleum Company in the amount of $1,402,800.91 together with accruing interest as provided by law from date of judgment, until paid, for helium sold and delivered during the ten-year period ending December 31, 1972.

2. It is further ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc. shall have judgment against the defendant Phillips Petroleum Company in the amount of $137,210.00 together with accruing interest as provided by law from the date of this Judgment until the Judgment is paid as reasonable attorneys' fees in the prosecution of this action.

3. It is further ordered, adjudged and decreed by the Court that Ashland Oil, Inc., on receipt of the payment of the helium together with interest thereon, as provided in item (1) above, shall deduct therefrom its expenses of prosecution in the amount of $57,685.49 and pay to its royalty owners on the basis of payments heretofore made to its royalty owners for gas sold and delivered and transported in interstate commerce one-half of said helium receipts together with its one-half of the accrued and accruing interest.

4. It is further ordered, adjudged and decreed by the Court that the defendant Phillips Petroleum Company pay the usual and ordinary costs of this litigation as provided by the Federal Rules of Civil Procedure.

5. It is further ordered, adjudged and decreed by the Court that the prayer of the Intervenor, United States of America, be, and the same is hereby denied. The defendant Phillips Petroleum Company has made no claim for relief as against the United States of America.

APPENDIX U

Order of Clarification of the United States District Court for the Northern District of Oklahoma, Dated January 15, 1981

(Filed January 15, 1981)

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKAHOMA
No. 67-C-238

ASHLAND OIL, INC.,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant,

and

UNITED STATES OF AMERICA,
Intervenor.

ORDER OF CLARIFICATION

The court has read the application of the plaintiff to clarify the prejudgment interest award and the response of the defendant thereto. Upon a thorough review of all the facts and circumstances, the court finds this continues to be an equitable matter.

In this court's opinions of August 13, 1973, and August 31, 1973, the plaintiff was awarded a judgment against defendant, together with yearly interest thereon. Said interest award was subsequently modified for the reasons stated in the memorandum opinion of December 28, 1978. Pursuant to the Tenth Circuit's mandate of October 15,

1979, the prejudgment interest award was reinstated in this court's order of January 8, 1980.

The court now has before it the question of whether the prejudgment interest should be calculated from the end of each month's delivery of helium bearing natural gas, or on the amount owing for each year's production of same.

The court concludes any prejudgment interest should continue to be calculated on a year-to-year basis.

IT IS THEREFORE ORDERED that prejudgment interest be calculated at the rate of six percent (6%) per annum from the last day of each year in question in the manner set forth in paragraph 16 of the opinion of this court of August 13, 1973, as corrected August 31, 1973, and as reported in 364 F.Supp. 6 at 11.

Dated this 14th day of January, 1981.

/s/ Luther Bohanon
United States District Judge

APPENDIX V

Order of the United States District Court for the Northern District of Oklahoma, Dated January 8, 1980

(Filed January 9, 1980)

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
No. 67-C-238

ASHLAND OIL, INC.,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant,

and

UNITED STATES OF AMERICA,
Intervenor.

ORDER

In accordance with the mandate of the Tenth Circuit Court of Appeals in this case, the judgment herein is hereby modified to include prejudgment interest as provided by law.

Dated this 8th day of January, 1980.

/s/ Luther Bohanon
United States District Judge

APPENDIX W

Judgment of the United States District Court for the Northern District of Oklahoma, Dated December 28, 1978

(Filed December 28, 1978)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ASHLAND OIL, INC.,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant,

and

UNITED STATES OF AMERICA,
Intervenor.

JUDGMENT

Based upon the Memorandum Opinion, including Findings of Fact and Conclusions of Law, filed herein this day, [as published in 463 F. Supp. 619.]

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Ashland Oil, Inc., have and recover from defendant Phillips Petroleum Company the amount of $218,244.00, together with interest thereon from this date, as provided by law

Dated this 28th day of December, 1978.

/s/ Luther Bohanon
United States District Judge

APPENDIX X

Opinion of the United States Supreme Court, Phillips Petroleum Co. v. Texaco, Inc., Dated February 19, 1974 (415 U.S. 125)

[415 US 125]

PHILLIPS PETROLEUM COMPANY, Petitioner,

v

TEXACO, Inc.

415 US 125, 39 L Ed 2d 209, 94 S Ct 1002
[No. 73-347]
February 19, 1974

SUMMARY

Asserting, as a basis for federal question jurisdiction under 28 USCS § 1331(a), that its claim arose under the Constitution, laws, or treaties of the United States, a seller of natural gas brought an action against the buyer in the United States District Court for the Northern District of Oklahoma seeking recovery of the reasonable value of the helium constituent of the natural gas, the seller contending that under § 11 of the Helium Conservation Act (50 USCS § 167i), the price which had been paid for the gas by the buyer in accordance with rates sanctioned by the Federal Power Commission under the Natural Gas Act of 1938 (15 USCS §§ 717-717w) did not include compensation for the helium constituent of the gas. The District Court granted the buyer's motion to dismiss for want of federal jurisdiction, but the Court of Appeals for the Tenth Circuit reversed the District Court's determination that federal jurisdiction was lacking (481 F2d 70).

Granting certiorari, the United States Supreme Court reversed. In a per curiam opinion expressing the view of

six members of the court, it was held that federal question jurisdiction under 28 USCS § 1331(a) was not established, since the effect of the statutes relied on by the seller was no more than to overcome a potential defense to the action, precluding the buyer's interposition of a plea of payment, and since the suit was, in effect, an action in quantum meruit, whose source was state law, not federal law.

DOUGLAS and BRENNAN, JJ., dissented on the ground that there should have been a full briefing and oral argument of the case.

WHITE, J., did not participate.

Briefs of Counsel, p 923, infra.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Courts § 257 — federal question — federal right or immunity

1. For purposes of Federal District Court jurisdiction under 28 USCS § 1331(a), in order for a claim to arise under the Constitution, laws, or treaties of the United States, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.

Courts §§ 259, 526 — federal question — matters raised by defense — matters raised by anticipation

2. For purposes of Federal District Court jurisdiction under 28 USCS § 1331(a), in order for a claim to arise under the Constitution, laws, or treaties of the United States, the federal questions must be disclosed upon the face of the complaint, unaided by the answer, and the complaint itself will not avail as a basis of jurisdiction insofar

as it goes beyond the statement of the plaintiff's cause of action and anticipates or replies to a probable defense.

Courts § 275 — reasonable value of helium — lack of federal jurisdiction

3. There is no federal question jurisdiction under 28 USCS § 1331(a) of a suit by a seller of natural gas against the buyer for the reasonable value of the helium constituent of the natural gas—the seller alleging that under § 11 of the Helium Conservation Act (50 USCS § 167i), the price which had been paid for the gas by the buyer in accordance with rates sanctioned by the Federal Power Commission under the Natural Gas Act of 1938 (15 USCS §§ 717-717w) did not include compensation for the helium constituent of the gas—since the effect of the statutes relied on by the seller is no more than to overcome a potential defense to the action, precluding the buyer's interposition of a plea of payment to defeat the seller's claim, and since the seller's suit is, in effect, an action in quantum meruit, whose source is state law, not federal law.

Briefs of Counsel, p 923, infra.

OPINION OF THE COURT

Per Curiam.

The respondent, Texaco, brought this action against the petitioner, Phillips Petroleum Co., in the Northern District of Oklahoma. The complaint asserted that Texaco had not been compensated for the helium constituent of natural gas sold by Texaco to Phillips. Texaco claimed it was entitled to the reasonable value of this helium in addition to the sums already paid by Phillips for the natural gas under the contract of sale.

[415 US 126]

It is conceded that there is no diversity of citizenship between the parties. Accordingly, Texaco relied, as the basis for federal jurisdiction, on 28 USC § 1331(a) [28 USCS § 1331(a)], asserting that its claim "[arose] under the Constitution, laws, or treaties of the United States." Phillips moved to dismiss for want of federal jurisdiction of the subject matter. The District Court granted this motion, and Texaco appealed to the Court of Appeals for the Tenth Circuit, which by a divided vote reversed the District Court's determination that federal jurisdiction was lacking. Phillips seeks certiorari to review the Tenth Circuit's decision and contends that past decisions of this Court make clear that Texaco's claim cannot be said to "aris[e] under the Constitution, laws, or treaties of the United States."

The substantive claim in this case is an outgrowth of an earlier decision of the Tenth Circuit, Northern Natural Gas Co. v Grounds, 441 F2d 704 (1971). That was a federal interpleader action, in which the Court of Appeals held that lessee-producers of natural gas could recover the reasonable value of helium contained in the gas that they produced and sold to pipeline companies, which later extracted and marketed the helium. The essence of the Grounds decision was its rejection of the buyers' contention that the contract price paid for the natural gas was compensation for "the gas stream in its entirety and, absent an express reservation, [that] the buyer gets the whole stream for such purposes as it may determine."[1] Id., at 720. The Court of Appeals reasoned that, as a result of the Helium Act Amendments of 1960, 74 Stat 922, which added

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1. The price paid here was in accordance with rates sanctioned by the Federal Power Commission, which has authority to establish such rates under the Natural Gas Act of 1938, 52 Stat 821, 15 USC §§ 717-717w [15 USCS §§ 717-717w].

§ 11 (50 USC § 167i [50 USCS § 167i]) to the Helium Conservation Act, 43 Stat 1110,

[415 US 127]

"the Natural Gas Act, and the FPC fixed service rates, do not apply" to "[a] sale of the commingled helium as a component of the [natural] gas stream." 441 F2d, at 721. Accordingly, the Court of Appeals concluded that "the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act . . . requires the conclusion that the FPC service rates *do not apply to deny recovery* for the contained helium" in the natural gas stream sold by the lessee-producers. The court went on to hold that the lessee-producers could therefore recover "the reasonable value of the helium content of the processed gas." Id., at 723. (Emphasis added.)

Because of the presence of federal interpleader jurisdiction, the court in Grounds did not consider whether there existed an independent basis for the exercise of federal jurisdiction. Texaco contends that the Court of Appeals in Grounds read the Natural Gas Act and § 11 of the Helium Conservation Act together to imply a federal cause of action for the recovery of the reasonable value of the helium constituent in natural gas. On the other hand, Phillips' position is that Grounds held only that the effect of these federal statutory provisions is to preclude the defense of payment to a quasi-contractual action brought for the recovery of the reasonable value of the helium. Hence, Phillips argues that the federal questions raised in the complaint are not part of Texaco's claim but are merely asserted in anticipation of a probable defense by Phillips.

[1, 2] This Court has repeatedly held that, in order for a claim to arise "under the Constitution, laws, or treaties of the United States," "a right or immunity created by

the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." Gully v First National Bank, 299 US 109, 112, 81 L Ed 70, 57 S Ct 96 (1936). The federal questions "must be disclosed upon the face of the complaint, unaided by

[415 US 128]

the answer." Moreover, "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." Gully, supra, at 113, 81 L Ed 70. See also Metcalf v Watertown, 128 US 586, 32 L Ed 543, 9 S Ct 173 (1888); Tennessee v Union & Planters' Bank, 152 US 454, 38 L Ed 511, 14 S Ct 654 (1894); Louisville & Nashville R. Co. v Mottley, 211 US 149, 53 L Ed 126, 29 S Ct 42 (1908); Taylor v Anderson, 234 US 74, 58 L Ed 1218, 34 S Ct 724 (1914); Skelly Oil Co. v Phillips Petroleum Co., 339 US 667, 94 L Ed 1194, 70 S Ct 876 (1950).

The Grounds case cannot properly be read as creating a federal cause of action, deriving from the Natural Gas Act and § 11 of the Helium Conservation Act, for the recovery of the reasonable value of helium contained in natural gas sold at rates sanctioned by the Federal Power Commission. Indeed, in commenting on its earlier Grounds decision, the Court of Appeals in the present case concluded that "satisfactory utility regulation *does not permit* a utility rate to be used to obtain a commodity which is not within the contemplation of that rate." (Emphasis added.) 481 F2d 70, 73. In other words, the Grounds case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium.

In short, the federal statutory provisions do not under Grounds create a federal right of recovery, but only preclude the interposition of a plea of payment to defeat a quasi-contractual suit for the value of the helium.[2]

[415 US 129]

[3] Texaco's suit for the reasonable value of the helium is, in effect, an action in quantum meruit, whose source is state law and not federal law. Cf. Oneida Indian Nation v County of Oneida, 414 US 661, 39 L Ed 2d 73, 94 S Ct 772 (1974). To the extent that the Natural Gas Act and the 1960 Helium Act Amendments may bear on this action for the recovery of the reasonable value of constituent helium in natural gas, it is clear that their effect is no more than to overcome a potential defense to the action. Under the settled precedent of our past decisions noted above, it thus cannot be said that this suit "arises under the Constitution, laws, or treaties of the United States." Accordingly, there is no federal jurisdiction under 28 USC § 1331(a) [28 USCS § 1331(a)].

The petition for a writ of certiorari is granted, and the judgment of the Court of Appeals is reversed.

Mr. Justice Douglas and Mr. Justice Brennan dissent from the summary disposition of this case without full briefing and oral argument. They would grant the petition and set the case for oral argument.

Mr. Justice White took no part in the consideration or decision of this case.

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2. Texaco has not pointed to any language either in the Natural Gas Act and the 1960 Helium Act Amendments or in the legislative history of these enactments that could be read to create a federal cause of action for the recovery of the reasonable value of the helium under the circumstances of this case.

APPENDIX Y

Opinion of the United States Court of Appeals for the Tenth Circuit, Texaco, Inc. v. Phillips Petroleum Company, Dated July 13, 1973 (481 F.2d 70)

TEXACO INC., a corporation,
Plaintiff-Appellant,

v.

PHILLIPS PETROLEUM COMPANY, a corporation,
Defendant-Appellee.

No. 72-1758.
United States Court of Appeals,
Tenth Circuit.
Argued and Submitted May 23, 1973.
Decided July 13, 1973.

Action was brought by lessee-producer, which had a contract with defendant gas company to sell gas, to recover amount allegedly due for helium which was separated out of the gas by defendant which made no payment therefor to lessee-producer. The United States District Court for the Northern District of Oklahoma, D.C. No. 71-C-167, Frederick A. Daugherty, Chief Judge, entered judgment dismissing action on ground that there was no federal question and the plaintiff lessee-producer appealed. The Court of Appeals, Breitenstein, Circuit Judge, held that since recovery of value of helium separated from gas moving interstate could be had only by reconciliation and application of Natural Gas Act and the 1960 amendments to Helium Act rather than contract law or principles

of equity, controversy was one arising under laws of the United States and federal court had jurisdiction.

Reversed and remanded.

William E. Doyle, Circuit Judge, filed a dissenting opinion.

Courts (Key) 289(2)

Action by lessee-producer, which had contracted to sell gas to defendant for movement in interstate commerce, to recover amount allegedly due for helium which defendant had separated out of gas sold to it without any payment to plaintiff for the helium contained in and separated from gas stated a controversy arising under laws of United States giving federal court jurisdiction since recovery of value of helium could only be had by reconciliation and application of Natural Gas Act in the 1960 amendments to the Helium Act rather than contract law or principles of equity. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq; 28 U.S.C.A. § 1331(a); Helium Act, § 11, 50 U.S.C.A. § 167i.

Elmer W. Adams, Tulsa, Okl. (Philip R. Wimbish, Tulsa, Okl., on brief), for plaintiff-appellant.

Don L. Jemison, Bartlesville, Okl. (Kenneth Heady, Bartlesville, Okl., and Richard B. McDermott, Tulsa, Okl., on brief), for defendant-appellee.

Before BREITENSTEIN, BARRETT and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The question is whether the complaint of plaintiff-appellant Texaco Inc. states a controversy arising under

the laws of the United States. If it does, federal court jurisdiction lies under 28 U.S.C. § 1331(a). Otherwise, there is no federal jurisdiction. The district court sustained the motion to dismiss of defendant-appellee Phillips Petroleum Company and dismissed the action on the ground that there was no federal question jurisdiction. We reverse.

We have here another controversy over helium. The basic background is outlined in our decision in the Consolidated Helium cases. See Northern Natural Gas Company v. Grounds, 10 Cir., 441 F.2d 704, cert. denied, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267, 404 U.S. 1063, 92 S.Ct. 732, 30 L.Ed.2d 751, and 404 U.S. 1065, 92 S.Ct. 732, 30 L.Ed.2d 754. We there held that lessee-producers of natural gas could recover the reasonable value of contained helium out of interpleader funds created by the government's purchases of helium from helium extraction companies and parent pipeline companies. In Consolidated Helium, federal jurisdiction was invoked under the Federal Interpleader Act, 28 U.S.C. § 1335, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402, and 2674, and the Tucker Act, 28 U.S.C. § 1346(a)(2). None of those jurisdictional grounds are found in the case at bar.

Diversity of citizenship is not present. More than the jurisdictional amount is admittedly at stake. The only basis for federal jurisdiction is 28 U.S.C. § 1331(a) which confers jurisdiction when "the matter in controversy * * * arises under the * * * laws * * * of the United States." Phillips says that the complaint presents no more than a simple, common law, contract action and does not pertain to any right or immunity created by any law of the United States.

The complaint alleges that plaintiff, a lessee-producer, and defendant are natural gas companies within the scope

of the Natural Gas Act; that plaintiff has made written contracts to sell gas to defendant for movement in interstate commerce; that for several years defendant has separated out the helium content of the gas and sold it; that defendant has not paid plaintiff for the helium contained in, and separated from, the gas; and that plaintiff has a right under the Natural Gas Act, 15 U.S.C. § 717 et seq., and under § 11 of the Helium Act amendments, 50 U.S.C. § 167i, to be paid for the helium.

It is said in Wright, Fed. Courts 2d H.B., p. 55, that no "clear test has yet been developed to determine which cases 'arise under' the Constitution, laws, or treaties of the United States." The leading case on the subject is Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70. The Court recognized these tests, Ibid. at 112-113, 57 S.Ct. 96: (1) a right or immunity created by the Constitution or laws of the United States must be an essential element of plaintiff's cause of action; (2) the right or immunity must be such as will stand or fall on the construction or effect of the federal Constitution or laws; (3) the controversy must be genuine and present; and (4) the controversy must be disclosed on the face of the complaint, unaided by the answer or the petition for removal.

We have recognized and applied the Gully tests in Regents of New Mexico v. Albuquerque Broadcasting Co., 10 Cir., 158 F.2d 900 (jurisdiction upheld in suit asserting rights under Communications Act of 1934 and regulations issued thereunder); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 10 Cir., 321 F.2d 767 (jurisdiction denied in suit for declaration of rights in congressionally appropriated funds for payment of money judgment of the Indian Claims Commission); and Midwestern Developments, Inc. v. City of Tulsa, Oklahoma, 10 Cir., 333 F.2d

1009, cert. denied, 379 U.S. 989, 85 S.Ct. 702, 13 L.Ed.2d 610 (jurisdiction upheld in suit relating to right of way granted under the Enid-Anadarko Act). In Mountain Fuel Supply Company v. Smith, 10 Cir., 471 F.2d 594, a suit involving rights under land patents granted pursuant to the Act of July 17, 1914, we upheld jurisdiction without discussion of Gully.

In Consolidated Helium we considered the claims of the pipelines and helium separation companies that they were entitled under their gas purchase contracts to receive the entire gas stream at the Federal Power Commission service rate and said that "private contract law and the principles applicable thereto are not controlling." 441 F.2d at 722. No good purpose would be served by repeating our analysis of the Natural Gas Act and the 1960 Helium Act amendments. We held that, Ibid. at 723:

> "* * * the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants."

In holding that it had no jurisdiction, the trial court said that the judgment in Consolidated Helium does not raise a federal question which will support jurisdiction under § 1331(a). We agree that the judgment will not itself support that jurisdiction. See Metcalf v. Watertown, 128 U.S. 586, 588, 9 S.Ct. 173, 32 L.Ed. 543, and Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 10 Cir., 321 F.2d 767, 770.

The trial court went on to say that the Natural Gas Act did not abrogate the contracts and that neither that Act nor the 1960 Helium Act amendments created any

right in the plaintiff. In Consolidated Helium we recognized that the Natural Gas Act did not abrogate private rate contracts as such, 441 F.2d at 720, and pointed out that price and other provisions of contracts for the interstate sale of natural gas have largely been nullified by Federal Power Commission regulations and orders. The trial court construed our decision in Consolidated Helium as permitting recovery by lessee-producers "on principles of equity by a reconciliation of federal statutes which did not abrogate existing gas contracts." We thought that we made plain that we did not allow recovery on the application of any principles of equity, see 441 F.2d at 719-720, but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate. 441 F.2d at 720 and 722-723.

We adhere to our decision in Consolidated Helium. Absent circumstances not present there or disclosed on the record now before us, recovery of the value of helium separated from gas moving interstate can be had only by reconciliation and application of the Natural Gas Act and the 1960 amendments to the Helium Act, not under contract law or principles of equity. We reject defendant's assertion that Consolidated Helium was an interim decision. The Supreme Court denied certiorari, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267, 404 U.S. 1063, 92 S.Ct. 732, 30 L.Ed.2d 751, and 404 U.S. 1065, 92 S.Ct. 732, 30 L.Ed.2d 754. The decision is final and is the law of this circuit. We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits.

We have here a genuine and present controversy disclosed on the face of the complaint and not asserted in anticipation of any defense. Plaintiff presents a substan-

tial claim resting on a reasonable foundation. The right asserted under federal laws is an essential element of plaintiff's case which must stand or fall on the construction or effect of the federal laws. The tests announced in Gully have all been met.

One further matter should be mentioned. In Consolidated Helium we pointed out that there are over 30,000 persons receiving income from helium-bearing natural gas produced by over 500 lessee-producers under thousands of leases. 441 F.2d 710 and 715. The Supreme Court said in Gully, 299 U.S. at 117, 57 S.Ct. at 100:

> "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. * * * To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end."

The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe that the federal courts have jurisdiction under 28 U.S.C. § 1331(a).

The judgment is reversed and the case remanded for further proceedings.

WILLIAM E. DOYLE, Circuit Judge (dissenting):

I respectfully dissent. Although the claim which is here presented bears a relationship to federal law, namely, the Natural Gas Act, 15 U.S.C. § 717 et seq. and the He-

lium Act, 50 U.S.C. § 167 et seq., the relationship is not sufficiently close to justify holding that this cause arises under federal law. The claim in question is based on a contract express or implied (in law) and the granting of relief does not require consideration, construction or interpretation of a federal statute. The fact that federal law is indirectly related to the controversy or that federal law may be an insubstantial ingredient of the claim is not sufficient.

The doctrine enunciated by Chief Justice Marshall in Osborn v. Bank of United States, 9 Wheat. 738, 6 L.Ed. 204 (1824), has long since been repudiated. *See* American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 36 S.Ct. 585, 60 L.Ed. 987 (1916) by Justice Holmes holding that libel and slander of a patent is lacking in federal jurisdiction since the state law governs and the patent law does not preempt merely because it involves a patent.

A similar result has been enunciated in a case involving the scope of a real estate patent where the dispute concerned accretion in an area bounded by the Mississippi River. Joy v. City of St. Louis, 201 U.S. 332, 26 S.Ct. 478, 50 L.Ed. 776 (1906). Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507, 20 S.Ct. 726, 44 L.Ed. 864 (1900), an action to enforce a right arising under a patent issued in connection with a mining claim issued by the Commissioner of the General Land Office, is also illustrative. In Shulthis v. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 5 L.Ed. 12 (1912), the Supreme Court in an often quoted passage stated:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting

the validity, construction or effect of such a law, upon the determination of which the result depends.

Professor Wright in his Law of Federal Courts (2d ed.) § 17 concedes that this area of the law is somewhat vague, but states unequivocally that federal law must be an essential element in the case. He recommends Professor Mishkin's test[1] "that for original federal jurisdiction there must be 'a substantial claim founded directly upon federal law.'" The cases appear to support the concept expounded in this test.

Turning to natural gas cases, we find that jurisdiction has been refused where the subject matter was similar to that in the instant case. *See, e.g.*, Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961), wherein a pipeline company had purchased gas from the petitioners. It was ordered by the Kansas Corporation Commission to pay higher rates. It did so under protest, alleging that since it was subject to Federal Power Commission jurisdiction the Kansas Commission could not exercise jurisdiction over it. The Supreme Court later sustained this contention. 355 U.S. 391, 81 S.Ct. 1303. Subsequently, Pan American brought suit in Delaware State Court to recover overpayments. The suppliers filed a petition for a writ of prohibition in the Delaware Supreme Court contending that the action fell within the exclusive jurisdiction of the federal courts under the Natural Gas Act. The Delaware court rejected this contention and the Supreme Court affirmed. The holding of the Supreme Court was that the action was governed by state law, not federal; that determination of the suit did not depend upon federal law. The fact that the prices to be paid were measured by rates filed with or promulgated by the Federal Power

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1. Mishkin, The Federal "Question" in the District Courts, 1953, 53 Col.L.Rev. 157, 165, 168.

Commission did not create a question cognizable in a federal trial court.

The Supreme Court's earlier decision in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950), dealt with contracts for the supply of gas reserves for a pipeline. The contracts provided that the supplier could terminate if the purchasers were unable to obtain a certificate of public convenience and necessity from the Federal Power Commission. A conditional certificate was issued. However, the supplier gave notice of termination stating that the certificate was not as contemplated. Suit was brought in federal court seeking a declaratory judgment that the contracts were in effect. The district court and the court of appeals found that the action arose under federal law, but the Supreme Court reversed and ordered that the case be dismissed for lack of federal question jurisdiction. The basis for the Court's decision was that the cause arose under state law. The Court pointed out that the claim did not present in and of itself a federal question involving as it did a question of substantive contract law. The presence of a federal question by way of defense did not suffice.

This court has also reached the same conclusion as was reached by the Supreme Court in *Pan American Petroleum Corp.* This was in Landon v. Northern Natural Gas Co., 338 F.2d 17 (10th Cir. 1964), cert. denied, 381 U.S. 914, 85 S.Ct. 1529, 14 L.Ed.2d 435 (1965). It was there stated that the claims involved were common law claims based on the substantive law of Kansas and were before the court only by reason of diversity jurisdiction.

In view of the foregoing, the case at bar is a simple action in the nature of quasi-contract or *indebitatus assumpsit* which is not dependent on federal law. At most it would call for a reference to rates promulgated by a federal agency. This is not enough of an ingredient to justify federal jurisdiction.

APPENDIX Z

Judgment of the United States Court of Appeals for the Tenth Circuit, Filed February 1, 1982

(Filed February 1, 1982)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM - November 16, 1981

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, and Honorable James E. Barrett, Circuit Judges

Nos. 74-1886 thru 74-1894
Nos. 75-1014 thru 75-1035
Nos. 75-1051 thru 75-1061

NORTHERN NATURAL GAS COMPANY, et al. (Helex Group),

v.

RALPH GROUNDS, et al., (Landowners Group),

and

SOCONY MOBIL OIL CO., et al., (Lessee-Producer Group).

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed in part and affirmed in part. The cause is remanded to the United States Dis-

trict Court for the District of Kansas with instructions to set aside the valuation determination and conduct further proceedings in accordance with the opinion of this Court. Each party shall bear its own costs on this appeal.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX AA

Order of the United States Court of Appeals for the Tenth Circuit Denying Petition for Rehearing and Suggestion for Rehearing en banc, Dated January 19, 1982

NOVEMBER TERM - January 19, 1982

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

Nos. 74-1886 through 74-1894
75-1014 through 75-1035
75-1051 through 75-1061

Consolidated Helium Cases II

NORTHERN NATURAL GAS COMPANY, et al,
(Helex Group),

vs.

RALPH GROUNDS, et al., (Landowners Group),
SOCONY MOBIL OIL CO., et al

(Lessee Producer Group).

This matter comes on for consideration of all of the outstanding petitions for rehearing and suggestions for rehearing en banc filed in the captioned appeals.

The Court has considered all of the responses filed by the various parties, both in opposition to and in favor of, the petitions and suggestions.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

The Clerk having transmitted the suggestions to the members of the panel and the judges of the Court who are in regular active service, except Circuit Judge William J. Holloway, Jr., who did not participate in the consideration or disposition of the captioned appeals and of the en banc suggestions, and no judge in regular active service or a judge who was a member of the panel that rendered the decision requested a vote on such a suggestion made by a party, the suggestions for rehearing en banc are denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX BB

Order of the United States Court of Appeals for the Tenth Circuit Enlarging the Time for Filing a Petition for Rehearing Until April 15, 1971, Entered March 9, 1971

MARCH TERM - MARCH 9, 1971

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth, and Honorable Robert H. McWilliams, *Circuit Judges.*

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

Upon consideration of the motion filed by "Helex Group" for the following orders: (1) for an order enlarging the time for filing a Petition for Rehearing until April 15, 1971; (2) for an order enlarging the time for presenting itemized and verified Bills of Costs until fourteen (14) days from final disposition of the Petition for Rehearing; and (3) for an order granting permission to exceed fifteen (15) pages of printing in presenting the Petition for Rehearing, the motions are hereby severally granted.

It is further ordered by the Court that the size of the Petition for Rehearing to be filed pursuant to the foregoing order shall not exceed thirty-five (35) pages of printing in length.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk.

APPENDIX CC

Order of the United States Court of Appeals for the Tenth Circuit Denying Petitions for Rehearing, Dated May 20, 1971

MAY TERM - MAY 20, 1971

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth, and Honorable Robert H. McWilliams, *Circuit Judges.*

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

Upon consideration of the petitions for rehearing heretofore filed by the parties hereto, it is ordered that such petitions are denied.

The costs will be considered by this Court at a later date.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk.

APPENDIX DD

Order of the United States Court of Appeals for the Tenth Circuit Denying Motion Containing Suggestions for Rehearing en banc, Dated May 20, 1970

MAY TERM - MAY 20, 1971

Before Honorable David T. Lewis, *Chief Judge,* Honorable Jean S. Breitenstein, *Senior Judge,* and Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable Robert H. McWilliams, *Circuit Judges.*

The Honorable William J. Holloway, Jr. disqualified himself and did not act on the motion. The Honorable James E. Barrett and the Honorable William E. Doyle did not participate.

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

A519

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

Upon consideration of the motion of the Helex Group containing suggestion for rehearing of the captioned cases en banc, it is ordered that the motion is denied.

The costs will be considered by this Court at a later date.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk.

APPENDIX EE

Order of the United Staates Court of Appeals for the Tenth Circuit Denying Motion by Respondent Landowners for Leave to File Petition for Rehearing Out of Time, Dated June 9, 1971

MAY TERM - JUNE 9, 1971

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth, and Honorable Robert H. McWilliams, *Circuit Judges.*

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

These cases are before the court on various motions which are severally disposed of herein.

1—*Motion of landowners for leave to file a petition for rehearing out of time.*

This motion was filed on June 8, 1971. Judgment was entered in all cases on March 2, 1971. An order was made on March 11, 1971, extending the time for petitions for rehearing to April 15, 1971. The court notes that the motion refers only to case No. 311-69 and does not use the caption approved by the court's September 10, 1969, order directing procedure. If the intent is to have the motion apply to all of the appeals, it is denied because it is untimely under Rule 40(a), F.R.A.P. If the intent is to have the motion apply only to case No. 311-69, it is denied for the same reason.

2—*Costs*

The March 11, 1971, order of the court enlarged the time for presenting bills of costs until 14 days after final disposition of petitions for rehearing. All timely petitions for rehearing were denied on May 20, 1971. On May 27, 1971, the court entered an order for allocation of costs. That order was premature and was entered through inadvert-

ance and oversight in that the time permitted by the March 11, 1971, order had not expired.

It is accordingly ordered that the May 27, 1971, order allocating and fixing costs is vacated and held for naught.

It is further ordered that all questions pertaining to costs in the court of appeals shall be held in abeyance until the further order of the court made after notice to all parties and an opportunity for all parties to be heard.

3—*Stay of mandate.*

The members of the Helex group have announced their intention to file petitions for certiorari in the Supreme Court of the United States in all 88 of the appeals disposed of by the judgments entered on March 2, 1971, and have moved for a stay of mandate in each case. The court believes that no need exists for 88 petitions for certiorari but, absent some agreement by the parties, it concludes that at the present stage of the proceedings there is nothing which it can do.

It is ordered that the mandate in each case is stayed until July 15, 1971. On or before June 28, 1971, the Helex group shall file one bond in the sum of $100,000 with corporate surety and serve copies thereof on the attorneys of record for the adverse parties. The conditions of the bond shall be those stated in 28 U.S.C. § 2101(f). The bond shall be for the benefit of all adverse parties in all 88 cases. The adverse parties shall have until July 6, 1971, to file whatever objections they may have to the bond. If the bond is approved by the court, the mandates in all cases shall be stayed until August 18, 1971, and in the event that on or before that date petitions for certiorari are filed in all cases in the Supreme Court of the United States, the stay shall continue until the final disposition of the cases in the Supreme Court of the United States.

/s/ Howard K. Phillips
Howard K. Phillips,
Clerk.

APPENDIX FF

Petition for Rehearing and Suggestion for Rehearing en banc to the United States Court of Appeals for the Tenth Circuit, filed by Panhandle Eastern Pipe Line Company and National Helium Corporation, November 30, 1981

Nos. 74-1886 through 74-1894
Nos. 75-1014 through 75-1035
Nos. 75-1051 through 75-1061

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NORTHERN NATURAL GAS COMPANY, ET AL.,
(Helex Group),

v.

RALPH GROUNDS, ET AL.,
(Landowners Group),

and

SOCONY MOBIL OIL CO., ET AL.,
(Lessee-Producer Group).

CONSOLIDATED HELIUM CASES II

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Petitioners Panhandle Eastern Pipe Line Company (Panhandle) and National Helium Corporation (National Helium) petition the Court for a rehearing of the Court's decision of November 16, 1981 pursuant to Federal Rules of Appellate Procedure Rule 40, and for a rehearing en banc pursuant to Federal Rules of Appellate Procedure, Rule 35.

ARGUMENTS AND AUTHORITIES

I.

SPECIAL DEFENSES WHICH MUST BE CONSIDERED BY THE COURT

With all due respect, the Court's present opinion does not address fundamental special defenses of Panhandle which are of paramount importance. These special defenses have been urged by Panhandle at every opportunity in the judicial proceedings in this case.

A. *The Court Did Not Decide or Even Consider Panhandle's Defenses Relating to Six Substantial Gas Purchase Contracts Which Define the Parties Rights As to Helium.*

Panhandle was the purchaser of gas under six contracts in which the sellers retained the right to extract the helium content of the gas stream and, failing to do so, waived all claims to the value of the helium content, and in some cases promised indemnity against claims for the value of the helium content, in the event such sellers failed to exercise their option to extract. The Trial Court's decision, *Northern Natural Gas Company v. Grounds*, 393 F.Supp. 949, 987-88 (D. Kan. 1974) (Grounds II), described these contracts as follows:

> "In Contract No. 152, the producer [Cities Service Oil Company] retained the option of extracting helium and liquefiable hydrocarbons, and promised that: 'In the event Seller does not extract helium at the plant site or sites . . . or prior to initial delivery of gas to Buyer, Seller will release all further claim to helium contained in gas delivered to Buyer.' [Contract No. 152, ¶ 12.3 p. 24]

> In Contracts Nos. 435, 767 (¶ 12.3), and 978, the producers [Cabot Corporation; Texaco, Inc.; Republic Natural Gas Company, now Mobil Oil Corporation] also retained the right to extract helium, and these contracts contain provisions similar to that found in Contract No. 152, releasing all future claim to helium.
>
> In Contract 284 (¶ 15.1, Warranty of Title) the producer [Ashland Oil & Refining Co.] agreed to 'remove the helium constituent prior to delivery of the gas . . . or, failing to do so, shall indemnify Buyer pursuant to the warranty provisions hereof, for all gases, of whatsoever nature, actually delivered to Buyer.'
>
> In Contract No. 919 (Article II, ¶ 2.-1(f)) the producer [United Producing Company, Inc., now Ashland Oil & Refining Co.] retained the option to extract helium and/or liquefiable hydrocarbons, but has failed to exercise this option in any way. Surprisingly, none of the producers in any of these six contracts has elected to construct a $20 million helium extraction plant for the purpose of removing helium for its own account, prior to delivery of the gas stream ton Panhandle Eastern. [Dixon 19:2068-2073]"

It is clear from the Trial Court's decision that all of the sellers under these six contracts were fully aware as of the time of executing these contracts that helium had a value and that such lessee-producers for a valuable consideration paid by Panhandle agreed to either extract the helium or forego any claim against Panhandle for the value of the helium. The contract language in each of the six contracts is clear and unambiguous. The Court failed to enforce the clear language of the contracts apparently in the belief that the opinion of this Court in *Grounds I* prevented it from doing so. 393 F.Supp. at 988. *Grounds I* did not make any such mandate to the Trial Court.

There may be a disagreement between the lessees-producers and their royalty owners concerning the effect as between them of the Panhandle contract. This, however, is a matter strictly between the lessee-producers and their royalty owners. Neither the Natural Gas Act nor the 1960 Helium Act Amendments prohibited private parties from contracting as between themselves as to how they would share in the helium value. Such Acts clearly do not prohibit private parties from so contracting.

The Court's failure to enforce the clear language of the contracts amounted to making new contracts between the parties. This Court has held on many occasions that it is totally improper for a Court to make a new contract between the parties. *Wise v. Westchester Fire Insurance Company*, 463 F.2d 386, 389 (10th Cir. 1972).

Moreover, if the decision of the Trial Court is left to stand and the contracts of the parties are rewritten by the Court, Panhandle has been deprived of valuable property rights without due process of law in violation of the Fifth Amendment of the United States Constitution. *Almota Farmers E & W Co. v. U.S.*, 409 U.S. 407 (1973); *U.S. v. 12.18 Acres of Land in Jefferson County, Kansas*, 673 F.2d 131 (10th Cir. 1980). At the very least, Panhandle is entitled to have this issue considered by the Appellate Court.

B. *The Court Failed to Decide or Even Consider Special Contract Rights Between Panhandle and Hugoton Production Company.*

The Trial Court described the factual situation involved at 393 F.Supp. 949, 988 as follows:

> "Panhandle purchased large volumes of helium bearing natural gas from Hugoton Production Company under the terms of a gas purchase contract dated May 1,

> 1996. [PEX 2, Contract 1500] A dispute arose between the parties, which was finally resolved by execution of a release dated May 1, 1967, wherein Hugoton released Panhandle and others from any and all claims whatever that Hugoton may have had, 'from the beginning of the world' up to the date of the release."

The release was executed on May 1, 1967, long after the passage of the Helium Act Amendments of 1960 and long after the extraction of helium had commenced. Hugoton Production and Panhandle had numerous claims and disputes with each other and this settlement was clearly intended, as evidenced by its unambiguous language, to release each of the parties:

> "from all, and all manner of, action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, judgments, executions, claims and demands whatsoever, in law or in equity, that the said Hugoton now has, ever had, or may have by reason of any matter, cause or thing whatsoever from the beginning of the world up to and including the end of the day upon which this release is dated * * *."
>
> PEPL Ex. 2, Contract 1500 PEPL Ex. 90, Release PEPL Ex. 3, Printout - Volumes

We suggest that if this release did not effectively release Hugoton Production Company's claim to be reimbursed for helium in the gas delivered to Panhandle, it would be impossible to prepare a release which would do so.

A valuable consideration was paid to Hugoton Production for this release. The effect of the Trial Court's

decision in this case, holding that this release did not apply to the helium content of the gas that Panhandle purchased from Hugoton Production, is to deprive Panhandle of a most valuable contract right bought and paid for by Panhandle. Such a judicial voiding of a private contract cannot be justified under any provision of the Natural Gas Act, the Helium Act Amendments of 1960, or under the United States Constitution. At the very least Panhandle is entitled to have this issue considered by the Appellate Court.

C. *The Court Did Not Decide or Even Consider the Effect of Judicial Admissions by Phillips Petroleum Disclaiming All Right to Helium Values.*

Panhandle received large volumes of helium-bearing natural gas from Phillips Petroleum Company under complex contractual agreements. PEPL Ex. 57, Gas Exchange Accounting. PEPL Ex. 2, Contracts 555; 626; 627; 669; 723; 724; 726; 734; 735; 736; 760; 761; 1159; 1171; 9012; 9013; and 9022. PEPL Ex. 3, Printout - Gas Volumes. PEPL Ex. 4, Printout - Gas Volumes.

In proceedings in the Trial Court in this case on May 6, 1966, the attorney for Phillips stated to the Court, at pages 8 and 9 of the transcript, that Phillips disclaimed any interest in the fund as to KC-1969 (Northern Helex). Proceedings, May 6, 1966, Tr. pp. 8 and 9.

In the pre-trial conference proceedings in the Trial Court in this case commencing December 5, 1966, the attorney for Phillips stated to the Court, at page 246 of the transcript, in regard to KC-1980 (National), that he declined to have Phillips characterized as a party or a claimant to the fund in KC-1980, stating, "* * * I have no claim to the fund before the Court." Proceedings, December 5, 1966, Tr. p. 246.

In proceedings in the Trial Court in this case on February 15, 1967, the attorney for Phillips stated to the Court, at pages 25 and 26 of the transcript, that "Phillips does not claim the helium in gas going through the plant of National Helium and has not claimed it at any time." At page 30 of the transcript the Phillips attorney stated that Phillips asserts "No claim to the fund, . . ." and at page 57 he stated, "We don't claim the fund and never have."

At the commencement of the trial in this case with respect to the title issue, the attorney for Phillips reviewed Phillips' role in the litigation and the claim of National and Northern that no further payment is due producers for the helium constituent, stating at page 44 of the trial transcript: "In other words, if we must appear with this class, our position for the class confesses the claim of National and Northern." (First Trial) Tr. 1: 38-44, 47-48.

In the "Memorandum in Support of the Attached Motion to Dismiss of Phillips Petroleum Company" filed by Phillips in the trial proceedings of this case, Phillips states:

> "Phillips was not named a defendant in the original pleading for a very good reason. Though it delivered gas to Panhandle under a contract of sale, which gas was later delivered to the plaintiff for helium extraction, Phillips did not claim the helium constituent against its transfer, but acknowledged that under its contract it had transferred title to the entire delivered stream to its purchaser, which was Panhandle. Thus, Phillips did not claim the fund adversely to National, nor to Panhandle, and no claim for relief and interpleader could be stated either by the plaintiff, or the third party plaintiff. This situation remains the same today, for in no circumstances or particular has Phillips ever laid claim to the interpleaded fund, or to any portion thereof."

The judicial admissions and confessions of judgment of Phillips as stated aforesaid are totally binding and conclusive on Phillips. Phillips is bound by such admissions and confessions and any claim or right to benefit as granted to Phillips by the Trial Court's decision is improper and must be set aside. As stated in the case of *In re Estate of Canell*, 183 Kan. 491, 495, 327 P.2d 883 (1958):

> "The admission of attorneys of record bind their clients in all matters relating to the progress and trial of a case. For the purposes of the suit, an admission made by counsel is conclusive; and in subsequent proceedings, or on rehearing, if the Court is satisfied that they were really made, they cannot be retracted."

At the very least, Panhandle and National Helium are entitled to have this issue considered by the Appellate Court.

D. *A Promise for the Benefit of a Third Party Beneficiary Is Unenforceable Where a Rejection or Disclaimer of the Benefit Has Been Made.*

In the November 16, 1981 decision this Court held that a minimum value or floor of $2.00 per M.c.f. has been established by contracts between the helium extractors and the United States for the benefit of the lessee-producers and the landowners. We vehemently deny that any such value was agreed upon and that any such contract was made by National Helium and the United States. Our discussion of this issue appears in Section III of this Petition for Rehearing. However, assuming, *arguendo*, that such a contract was made, it cannot be applied to benefit the lessee-producers referred to in the foregoing Sections A, B, and C of Section I hereof because each

of such parties specifically rejected and/or disclaimed such a benefit.

The law concerning third party beneficiaries is clear that a beneficiary may disclaim or reject a promised benefit and once such rejection or disclaimer occurs the promised benefit is totally lost. 17 Am.Jur.2d, Contracts §314 (1964 and Supp. 1981). Here the lessee-producers under the six contracts, referred to in Section I.A and Hugoton Production Company in the contract discussed in Section I.B disclaimed and rejected any claim to the helium. The same is true with regard to Phillips Petroleum Company as discussed in Section I.C hereof.

The law on this subject is stated succinctly as follows, Restatement Of The Law (Second), Contracts 2d §137, at 297 (1973):

> "A beneficiary who has not previously assented to the promise for his benefit may in a reasonable time after learning of its existence and terms render any duty to himself inoperative from the beginning by disclaimer."

E. *Panhandle Is Not Liable for Helium Value Where No Federal Power Commission Rate Schedules Are Involved.*

The Court in *Northern Natural Gas Company v. Grounds*, 441 F.2d 704, 722-23 (10th Cir. 1971) (Grounds) justified payment to lessee-producers and their royalty owners on the basis that the Federal Power Commission rate schedule did not include payment for the helium content. In the case of Panhandle's own production, Panhandle played the dual role of producer and pipeline company. It simply produced the gas and put it into its pipelines for interstate shipment. There were no gas purchase contracts involved and thus no Federal Power Commission

rate schedules were filed. As between royalty owners and Panhandle there were only oil and gas leases which this Court held in *Grounds I*, covered the entire gas stream including the helium constituent. It is thus apparent that the rationale of the Court in establishing a basis of liability to the extractors for the helium content is inapplicable to the situation covering Panhandle's own production where there were no rate schedules on file with the Federal Power Commission. No other basis of liability has been alluded to by either the Trial Court or this Court. At the very least Panhandle is entitled to have this issue considered by the Appellate Court.

The same logic applies to the situations where exchanges of gas with others were involved. In those cases no Federal Power Commission rate schedules were involved - only a barter of gas for gas with no money exchanged.

II.

THE COURT IMPROPERLY DETERMINED THAT ASHLAND I WAS THE LAW OF THE CASE IN THE PRESENT ACTION.

The "law of the case" doctrine concerns the continued application of a rule of law previously determined in a case at bar. *Chicago, Rock Island and P. R. Co. v. Hugh Breeding, Inc.*, 247 F.2d 217, 223, (10th Cir. 1957); 1B, Moores Civil Procedure, ¶O. 404(1), 403. The Court in the instant case has held that *Ashland I* is the "law of the case" and that the accounting method directed by the court in that case be used to determine the reasonable value of the helium content of the gas processed by the Helex Group in the present case. The Court has improperly applied the "law of the case" doctrine.

The "law of the case" doctrine is applicable only to rulings which have been determined in a particular case. The Court's decision to apply Ashland I as the "law of the case" to the present case is based on the decision of *Major v. Benton,* 647 F.2d 110 (10th Cir. 1980). *Major* is clearly inapplicable in this situation. *Major* involved the issue of whether a question which had been decided in a prior appellate proceeding was controlling in the decision which was then before the Court.

The simple facts reveal that *Ashland I* and the present case are totally different cases involving different fact situations. Each proceeding does involve the determination of the reasonable value of helium at the point of delivery by the lessees-producers. Here any commonality ends.

The parties in the present case are totally different from the parties involved in *Ashland. Ashland* involved only approximately 18 wells, all within close physical proximity of one another. The present case involves far in excess of one thousand wells spread over a four state area. The natural gas produced from the Ashland wells had high contents of helium and were piped to two plants both owned by a single operator. The gas from the wells in the present case have a wide variation in helium content and the average content is far less rich and is transported long distances to several different plants with different owners and with different capital investments and operating costs. All these differences make the application of the "work back" theory as determined to be the "law of the case" in Ashland totally unreasonable and impossible of uniform or fair application in this case.

The doctrine of the "law of the case" by definition recognizes that the law which is finally applied in one case may not be applicable in another if the situation of

the principal parties and the facts in each are different. These differences may call for different results. *Champlin Refining Co. v. Commissioner of Internal Rev.*, 123 F.2d 202, 204 (10th Cir. 1941).

Champlin Refining involved the valuation, as to the plaintiff as transferree for tax purposes, of some oil and gas leases. The leases had been transferred to the plaintiff corporation by the sole stockholders of the corporation. On previous litigation the value of the leases had been determined as to the transferors. Both the corporation and the IRS sought to use the former decisions and the method of valuation used by the court in those cases to justify their own contention of value. The court rightfully held:

> "Neither the parties nor the issues herein are the same as in the former cases. There the litigation was between Champlin and the government. Here it is between the corporation and the government. There Champlin was allowed depletion as the discoverer and developer of the property, while here the petitioner is entitled to the depletion as purchaser of a developed lease. Neither of the former decisions constitute the law of the case."

Id. at 204.

It is interesting to note that if this Court's decision is permitted to stand, it would bind petitioners to a decision in a case where it was not a party but where Phillips Petroleum Company was the party being claimed against and where it is here in the totally conflicting position of alleged beneficiary.

These differences demand that the Court let the facts of this case determine the appropriate valuation method or methods. This court in *Ashland* acknowledged that the

determination of value was "basically a factual matter determined through application of appropriate legal doctrines. This is the value at the wellhead of the helium commingled with the natural gases there being produced." *Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d at 381, 385 (10th Cir. 1975). From this statement it is clear this court recognized at one time that the accounting method could not be determined by a rule of law but that the facts of the case must control.

The court's decision to apply *Ashland I* as the "law of the case" was apparently based on the assumption that the *Ashland I* and *Grounds* cases were consolidated for the purpose of determining the value of the helium content of the processed gas. This is simply incorrect. The two cases were consolidated only for the purposes of oral argument to the court en banc. The cases were not consolidated for the determination of value or of judgment. Moreover, the court in *Ashland I* specifically held that although the cases were consolidated for hearing the court would not consider *Grounds* in its opinion. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 554 F.2d 381 (10th Cir. 1975). Again, this is a recognition by the court that the two cases should be considered individually on their own separate facts.

On appeal the court reached its decision with respect to the application of the "law of the case" on essentially no record. The Helex group realized that a fair resolution of the case could not be made on only a small part of the record and it therefore requested that the entire record be brought up to this Court and that this Court make its determination on all the evidence. These requests were denied.

III.

THERE IS NO FACTUAL BASIS FOR DETERMINING THAT THE GOVERNMENT AND PETITIONERS INTENDED A CONTRACT FOR THE BENEFIT OF THIRD PARTIES

The Court incorrectly determined that the lessee-producers and landowners were third party beneficiaries to the contracts between the Helex companies and the United States. Specifically, this Court found that in negotiations the United States allowed an amount of $2.00 for the value of helium and that it was the intent of the parties that the $2.00 allowance was for the benefit of the lessee-producers and landowners. Whether or not the parties made a contract for the benefit of third parties was a question of intent of the parties. *Ronnau v. Caravan International Corp.*, 205 Kan. 154, 468 P.2d 118 (1970). "Since contracting parties are presumed to act for themselves, an intent to benefit a third party should be clearly expressed in the contract." *Id.* at 159. In this case the Circuit Court has concluded that it was the intent of the parties based upon a unilateral memorandum of a government employee not involved in the negotiations.

There was evidence that the United States unilaterally used a $2.00 figure in calculation of a price which it was willing to pay. However, these petitioners assert that the $2.00 figure represented the government's views of the value, not at the wellhead, but at the plant inlet for gas delivered by the pipeline companies at a high pressure, dehydrated, at steady volume, and with certain other specific qualities for which the pipeline companies were responsible. The United States also used other unilateral values in working up its fictitious price - such as a 6% return on investment. There is no evidence that the Helex

companies agreed to those figures or were even concerned with them - their only concern being an ultimate price which was acceptable to them.

However, overriding in importance is the fact that these matters were not in issue in the Trial Court. The contention that the lessee-producers and landowners were third party beneficiaries as to the $2.00 was not even advanced by lessee-producers and landowners at the trial of *Grounds I* or *Grounds II*. Judge Brown made no findings or conclusions with reference thereto. To make this determination as to the intent of the parties, in the absence of any contract language affecting the matter, without a complete hearing on the facts is a gross miscarriage of justice and results in a deprivation of these parties' rights without having had a day in court.

IV.

PETITIONERS ARE ENTITLED TO A HEARING AND DECISION BY THE COURT EN BANC

The matters involved in this litigation are of great importance, are highly complex and clearly warrant the consideration of the Court en banc. The oral argument was made to the Court en banc, the case was submitted without qualification to the Court en banc and the decision of this Court should consequently have been by the Court en banc. Likewise, consideration of this motion should be by the Court en banc. Traditional notions of fair play require en banc consideration.

CONCLUSION

The special issues of the petitioners discussed in this motion are of critical importance to the petitioners. They were not considered by this Court in its opinion and a decision on these issues is required. Petitioners have been

INTRODUCTORY STATEMENT

The respondents, Mobil Oil Corporation, Mapco Production Company, The Superior Oil Company, and Diamond Shamrock Corporation, respectfully request that this Court deny the petitions for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Tenth Circuit in this case. That opinion is reported at *Northern Natural Gas Co. v. Grounds*, 666 F.2d 1279 (10th Cir. 1981), reh. denied, 1982.

OPINIONS BELOW

The numerous opinions below begin with the unreported opinion of the United States District Court for the District of Kansas in what is described as the Consolidated Helium Cases, which concluded the court had jurisdiction of the six interpleader actions involved herein. (App. p. A311).[1] The United States Court of Appeals for the Tenth Circuit affirmed the decision. (App. p. A309). Thereafter, the United States District Court for the District of Kansas bifurcated the cases as to liability and damages. Pertaining to the damage issue, the federal district court of Kansas rendered an opinion finding no liability on the part of the Helex Group. (App. p. A170).[2] The Court of Appeals for the Tenth Circuit in *Grounds I* reversed the district court's opinion as to the liability of the Helex Group, denied the Landowners Group's claims under the Tort

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1. References to "App." pertain to the separate Joint Appendix which was previously filed with the petitions for writ of certiorari by the helex companies, pipeline companies, and Landowners Group. The Joint Appendix contains the numerous previous decisions in these actions.

2. In the interest of brevity, and because of the similarity of positions, the helex petitioners and pipeline petitioners will be referred to as the Helex Group.

Claims Act, and remanded the actions for further consideration of the district court. *Northern Natural Gas Company v. Grounds,* 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951 (1971) (*"Grounds I"*). (App. p. A133). The petitions for rehearing and suggestion for rehearing *en banc,* filed by the Helex Group with the Court of Appeals for the Tenth Circuit, were denied. (App. pp. A516-519). Likewise denied was the petition for leave to file a petition for rehearing out of time of the Landowners Group. (App. p. A521). Petitions for writ of certiorari by the Helex and Landowners Groups were thereafter denied.[3] On remand, the federal district court of Kansas rendered its decision as to damages. (App. p. A28). Thereafter, the Court of Appeals for the Tenth Circuit in *Grounds II* set aside the valuation determination of the Kansas federal district court and remanded the actions for further proceedings pertaining to additional damages. *Northern Natural Gas Co. v. Grounds,* 666 F.2d 1279 (10th Cir. 1981), reh. denied, 1982 (*"Grounds II"*). (App. p. A1). It is that opinion from which the petitioners seek review.

In addition to the aforementioned opinions, there have been others which either resulted from a consolidated hearing or involved identical issues. Subsequent to the Kansas federal district court's opinion granting damages, the Court of Appeals for the Tenth Circuit consolidated for hearing those actions with an appeal from the United States District Court for the Northern District of Oklahoma. *Ashland Oil, Inc. v. Phillips Petroleum Company,* 364 F.Supp. 6 (N.D. Okla. 1973). (App. p. A468). The consolidated hearing resulted in the Court of Appeals for the

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3. *Grounds v. Northern Natural Gas Co.,* 404 U.S. 951 (1971), cert. denied; *Northern Natural Gas Co. v. Mobil Oil Corp.,* 404 U.S. 1063 (1972), cert. denied; *Panhandle Eastern Pipe Line Co. v. Mobil Oil Corp.,* 404 U.S. 1063 (1972), cert. denied; *Grounds v. Northern Natural Gas Co.,* 404 U.S. 1065 (1972), reh. denied.

Tenth Circuit in *Ashland I* affirming in part and reversing in part, and remanding the Oklahoma action to the district court for further proceedings. *Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d 381 (10th Cir. 1977), cert. denied, 434 U.S. 921, 968 (1977) ("*Ashland I*"). (App. p. A429).[4]

Upon remand the Oklahoma federal district court further determined the issues as to damages. (App. p. A390). On appeal the Court of Appeals for the Tenth Circuit in *Ashland II* affirmed the damage finding, reversed in part and remanded the action to the Oklahoma federal district court. *Ashland Oil, Inc. v. Phillips Petroleum Company*, 607 F.2d 335 (10th Cir. 1979), cert. denied, 446 U.S. 936 (1980) ("*Ashland II*"). (App. p. A385). On remand the federal district court in Oklahoma modified the judgment (App. p. A492) and subsequently entered an order of clarification. (App. pp. A490, A492); aff'd. *Ashland Oil, Inc. v. Phillips Petroleum Company*, No. 81-1159 (10th Cir. Feb. 10, 1982).[5]

JURISDICTION

The jurisdictional requisites are adequately stated in the Petitions.

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4. In *Ashland I* the petitioners, both the Helex and Landowners Groups, filed briefs as *amici curiae*, as well as participated directly in the *Grounds* portion of the hearing.

5. In addition to the aforementioned decisions, other courts have reviewed the contracts involved in this litigation. In finding the Government had breached its contract with Northern Helium Company, one member of the Helex Group, the United States Court of Claims awarded that company $33,457,400.00 in damages representing the helium not taken from 1972 through 1983. *Northern Helex Co. v. United States*, 634 F.2d 557 (Ct. Cl. 1980). The remaining members of the Helex Group have subsequently settled for the following amounts: $27,500,000.00, Panhandle Eastern Pipe Line Company; $24,000,000.00, Cities Service Company; and $15,000,000.00, Phillips Petroleum Company.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment to the Constitution of the United States provides:

> "No person shall . . . be deprived of life, liberty or property, without due process of law. . ." (App. p. A539).

STATEMENT OF CASE

Essential Facts

Helium is a noncombustible gas found in reservoirs in the Hugoton-Panhandle Gas Fields of Texas, Oklahoma and Kansas, where it is naturally commingled with natural gas. It comprises about one-half of one percent of the gas in such reservoirs. The helium is necessarily produced with and is a component of a natural gas stream and cannot be separately produced or economically separated from the natural gas at the well. The fields in the aforementioned three states contain 99% of the nation's recoverable supply of helium. (App. p. A8).

During the past 25 years the importance of helium has been noted as it pertains to national defense, science and industry. Congress, in 1960, reflecting the urgent need to conserve this valuable natural resource for the future, authorized the Secretary of Interior to enter into long-term contracts for conservation of this helium. 50 U.S.C. §§167a, et seq. Section 11 of the Helium Act provided that the Natural Gas Act should not be applicable to this commingled helium.[6]

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6. A more detailed discussion of the facts pertaining to the conservation program is recited in *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951 (1971), 404 U.S. 1063 (1972). (App. p. A133).

The Helium Act provided that the Secretary of Interior was authorized to enter into long-term contracts to acquire, process, transport or conserve helium for a period not exceeding 25 years. The Bureau of Mines was directed to contract with private industry having under their control or access volumes of gas with sufficient helium content to justify economic extraction. Pursuant to those statutory provisions, contracts were executed with the Helex Group. These contracts were entered into expeditiously in order to prevent waste of the helium and provided that none of the Helex Group could sell helium at a price lower than the contract price with the Government.

It was recognized from the beginning by both the Helex Group and the United States Government that there were "knotty legal problems" unresolved. However, it was determined that any litigation relative to value and division of interest involving the Landowners and Lessee-Producer Groups was to be postponed "until another day." (App. p. A9). Anticipating future claims by the Lessee-Producer Group for a helium payment, the Government contracts contained special provisions, under which the Government was obligated to pay a base price averaging between $11 and $12 per mcf for extracted helium, and an additional amount equivalent to the price required to be paid to third parties for the commingled helium supplied by them, less an approximate $3 per mcf, which liability was assumed by the Helex Group. (App. pp. A142, A156).

Legal Action Was Commenced

Subsequent to the execution of the aforementioned contracts between the Helex Group and the United States Government, and in some instances prior to commencement of the extraction of the helium, these Consolidated Helium Cases were brought in 1962 in the United States

District Court for the District of Kansas. Jurisdiction of these consolidated class actions was invoked pursuant to 28 U.S.C. §§1335 and 2361. Affirmation by the Court of Appeals for the Tenth Circuit regarding the finding of jurisdiction pursuant to the aforementioned statutes was thereafter granted. (App. p. A309). The interpleader action was brought by the Helex Group in which they sought judicial determination of the rights to the helium or funds attributable thereto, which were paid and were to be paid to the members of the Helex Group by the United States Government for the delivery of the helium. The United States Government participated as a defendant in Tucker Act and Tort Claims actions brought by the Landowners Group, alleging inverse condemnation and conversion, which were consolidated with the interpleader cases. (App. pp. A186-187).

The primary issues in the trial pertaining to liability were whether the oil and gas leases authorized the Lessee-Producer Group to produce and market helium gas, as well as gaseous constituents produced by their gas wells and, if so, whether the Lessee-Producer Group was entitled to payment from the fund of a reasonable value for the helium contained in the natural gas delivered to the Helex Companies. In addressing those issues, the district court found, subsequent to a 43-day trial, that the helium was covered by the oil and gas leases, which leases intended to authorize production and sale of the gas, including the helium gas produced from the gaseous reservoirs. (App. p. A170). The court of appeals affirmed the district court as to those particular findings. (App. pp. A133, A168-169).

Pertaining to the claims for the helium payment by the Lessee-Producer Group, the court of appeals held that they were entitled to recover from the interpleader fund the reasonable value of the commingled helium delivered.

(App. pp. A168-169). In addition, that court concluded that the grant of gas by the leases covered all components of the gas, including the helium. (App. p. A153). Implicit in that holding is the finding that the lessors were entitled to royalty on the amounts received by the Lessee-Producer Group, pursuant to the lease provisions, which almost exclusively provide for a one-eighth royalty. Petitions for writ of certiorari were filed by the Helex and Landowners Groups and each was denied.[7]

Upon the liability phase being completely concluded as described in the aforementioned paragraphs, the actions were remanded to the district court for the purpose of determining the reasonable value of the helium. (App. p. A133).

Prior to the retrial by the United States District Court for the District of Kansas of the Consolidated Helium Cases, an action in the Oklahoma federal district court entitled *Ashland Oil, Inc. v. Phillips Petroleum Company*, 364 F.Supp. 6 (N.D. Okla. 1973) was tried. The *Ashland* case involved helium produced from wells operated by Ashland as a Lessee-Producer, which was sold to Phillips. The Oklahoma federal district court found that the Lessee-Producer Group was entitled to the reasonable value of the helium which resulted in prices ranging from $11.76 to $16.98 per mcf. In addition, that court found that there were no comparable sales and, therefore, the proper methodology for calculating market value of the helium was the work-back or proceeds-less-expenses method.

Prior to an appeal from the Oklahoma federal district court's decision, the retrial of the Kansas Consolidated Helium actions was completed. In the damage phase, the federal district court for Kansas, though finding that the

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7. See supra n. 3

lease, as well as the gas sales contract conveyed all components of a natural gas stream including the helium, held contrary to the Oklahoma federal district court and disregarded the work-back method. The Kansas federal district court did not find that there were comparable sales in which to establish the market price or value of the commingled helium, but rather rejected the work-back method as simply unreasonable and found it inapplicable to raw materials. (App. p. A13). Instead, the Kansas federal district court adopted the position of one witness as to the value of the helium as being between 60 and 70 cents per mcf for the period involved.

Subsequent to the Kansas federal district court decision on remand, the Court of Appeals for the Tenth Circuit decided the *Ashland* appeal and, on January 27, 1975, rendered its decision affirming the Oklahoma federal district court's finding of the value of the helium at a range of $11.76 to $16.98 per mcf. (App. p. A561). Thereafter, a rehearing was granted and the Tenth Circuit, acting *en banc*, withdrew its opinion and vacated the judgment, and granted a rehearing *en banc*. Simultaneously, the Tenth Circuit, acting *en banc*, granted a rehearing *en banc* on the appeal of the Kansas Consolidated Helium Cases, and consolidated such *en banc* hearing with the *Ashland en banc* hearing. (App. p. A340).

The consolidated hearings of the two appeals were heard by the *en banc* court on November 17, 1976, and the parties were previously given an opportunity to file all appropriate briefs. The record before the Court of Appeals for the Tenth Circuit did not evidence any material significant difference between the contracts and contractual relationships existing between the parties involved in the Kansas and Oklahoma proceedings. (App. p. A12). Upon reviewing the evidence in the two similar actions,

which involved identical legal issues and which were argued in the consolidated hearing, the Court of Appeals for the Tenth Circuit rendered its opinion, finding that the work-back method was the appropriate methodology for determining the value of the helium. In addition, the court of appeals rejected the argument of the Landowners Group that they were entitled to one-half of the value of the helium, and found that the Landowners Group was entitled to royalty pursuant to the lease contractual provisions. The court of appeals affirmed the district court's awarding of prejudgment interest, and remanded the Oklahoma action for redetermination of the starting point from which to calculate the value of the helium. The Kansas action was held in abatement in an effort to exercise judicial economy, since the legal questions had been resolved by the court of appeals as a result of the consolidated hearing. (App. p. A4).

On remand, the Oklahoma federal district court adopted a different initial point of sale and by application of the work-back method and through its interpretation of the equity theory of quantum meruit, found the value of the helium to be $3.00 per mcf. (App. p. A428). The Oklahoma federal district court likewise modified its earlier holding as to granting prejudgment interest and found the Lessee-Producer Group was not entitled to such. On appeal, the Court of Appeals for the Tenth Circuit reversed the district court as to the issue of prejudgment interest, and otherwise affirmed the lower court's decision. (App. p. A385). On May 11, 1981, the Court of Appeals for the Tenth Circuit issued an order removing the Consolidated Helium Cases II from abated status, and terminating the *en banc* status. (App. p. A331). The order provided that the parties in the Consolidated Helium Cases II could file briefs pertaining to a discussion of the law and facts as

they have developed since the cases were originally argued. (App. p. A331). Thereafter, all parties involved were provided the opportunity to reargue their various positions as to the damage phase. On January 16, 1981, the court of appeals issued its decision from which the petitioners are seeking this writ of certiorari. The Court of Appeals for the Tenth Circuit again reaffirmed its legal conclusion that the work-back method was the proper methodology for calculating the value of the helium. (App. pp. A7, A13). In addition, the court of appeal's found that the Lessee-Producer Group was entitled to a minimum of $2.00 per mcf, as reflected by the intent of the parties, i.e., the Helex Group and the United States Government, and the evidence presented to the court. (App. pp. A15, A17-20). The court of appeals again affirmed the awarding of prejudgment interest. (App. p. A8). Petitions for rehearing were filed by the Helex and Landowners Groups.

On January 19, 1982, the judges of that court who were in regular active service, except one who did not participate in the captioned appeals, denied the petitions for rehearing and suggestion for rehearing *en banc*. (App. pp. A512, A513).

ARGUMENT

The Decisions of the Court of Appeals Are Not in Conflict With Other Decisions

The Court of Appeals for the Tenth Circuit held the gas sales contracts and leases effectively conveyed all components of the natural gas stream, including helium. (App. pp. A153, A40). The decisions applied the provisions of the applicable contracts and followed the intent of the parties. The court of appeals, as early as 1971, resolved the lia-

bility issue, holding that though the gas sales contracts had conveyed title, the title failed where payment for the helium was absent. (App. pp. A168, A169). Petitions for writ of certiorari were filed by the Helex Group and were denied.[8]

In holding as it did in the liability phase, the Court of Appeals for the Tenth Circuit addressed the issues raised now by the petitioners as to the relationship of the Natural Gas Act and the Helium Act Amendments of 1960 as they pertain to the obligation to pay for the helium. (App. pp. A158-168). The court of appeals upheld the validity of the contracts and rejected the arguments of the Helex Group, which contended the value of the helium was limited by the Natural Gas Act. In doing so the court of appeals followed elementary quasi-contract principles and as a matter of law established the rights of the parties. *Schenley Distillers Corp. v. Kinsey Distilling Corp.*, 136 F.2d 350 (3rd Cir. 1943).[9] (App. pp. A168, A169). No constitutional issue is involved. Rather, there was the simple issue of whether the Helex Group was required to pay for the helium. The court of appeals, approximately eleven years earlier, ruled the payment was required. That decision affects only the contracts before this Court, which are limited in number.

The attempt by the Helex Group to separate the gas sales contracts into two classes, in an effort to circumvent the court of appeals' decision, is likewise not new. The court of appeals, in 1971, found that title failed for failure to pay for the helium. (App. pp. A168, A169). That legal conclusion is applicable to all gas sales contracts in-

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8. Supra n. 3

9. The State of Kansas, the forum for these actions, follows the quasi-contract theory. *Minnesota Avenue, Inc. v. Automatic Packagers, Inc.*, 211 Kan. 461, 465 (1973).

volved. (App. pp. A12, A113). The particular provisions in some of the gas sales contracts were inserted as an attempt to simply protect the Helex Group as to the title to the helium. (App. p. A113). Since title failed, payment is due under all gas sales contracts.

The court of appeals' construction of §11 of the Helium Act and the Natural Gas Act is in accordance with decisions of this Court, holding that only the lawful rate may be paid for the gas. *Arkansas Louisiana Gas Co. v. Hall*, ... U. S. ....., 69 L.Ed.2d 856 (1981). *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). When an additional valuable commodity is received, as here, payment must be made for its reasonable value, in addition to the lawful rate. *United States v. Wabash R. Co.*, 321 U.S. 403 (1944); *Baltimore & Ohio R. Co. v. United States*, 305 U.S. 507 (1939); *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939).

Clearly, there are no conflicts between the decisions of this Court and the opinion of the Court of Appeals for the Tenth Circuit. The resolution of the quasi-contract question regarding the obligation to pay reasonable value for the helium was correctly decided and final in 1971. The present resurrection of that issue should be rejected on principle of finality, as well as recognition of the limited effect of the decision and its consistency with the opinions of this Court.

The Court of Appeals Correctly Decided the Proper Legal Methodology for Calculating the Value of the Helium

The court of appeals was correct in its holding the work-back method was the proper methodology for determining the value of the helium. That court followed the legal principles pertaining to introduction of evidence

which provides that in the absence of comparable sales the next appropriate method of calculating value is by means of the work-back method. (App. p. A443). The work-back method is neither novel nor difficult to apply. *United States v. Wyoming,* 331 U.S. 440 (1947); *Navajo Tribe v. United States,* 364 F.2d 320 (Ct. Cl. 1966). Both the Kansas federal district court and the court of appeals failed to find any comparable sales. (App. pp. A440, A443). It was based upon the facts of this case that the appellate court adopted the work-back method.[10]

Separately, the court of appeals followed its prior decisions in *Ashland I* and *Ashland II,* which have likewise adopted the work-back method. (App. pp. A429, A385). *Ashland I* resulted from the consolidated hearing in which the Helex Group petitioners, as well as all parties, fully participated. The applicable gas sales contracts involved in this litigation, as well as those offered in the pending Oklahoma action, were before that court. (App. p. A12). Based on the review of all of those contracts and the findings of the separate district courts, the court of appeals ruled the work-back method was the only appropriate method. (App. p. A429). That rule of law was again applied in the *Ashland II* decision. (App. p. A385). (See also App. p. A12).

Subsequent to the consolidated hearing in *Ashland I* and the decision in *Ashland II,* the court of appeals held further hearings in the Kansas litigation. Again it was found that through the application of the appropriate evidentiary principle of law, the work-back method was the

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10. The court of appeals, in the opinion from which the Helex and Landowners Groups are appealing, pointedly found the Helex Group ". . . were fully aware, during the course of the 1974 proceedings in Kansas upon remand, that in the 1973 Oklahoma proceedings the work-back method of valuation had been employed." (App. p. A10).

proper methodology to calculate the value of the helium. (App. pp. A7, A12).

Moreover, in addition, the court of appeals applied the salutary principle of the law of the case. (App. pp. A12, A13). That legal principle was appropriate in that the record before that court did not evidence any material significant differences between the contracts and contractual relationships existing between the parties involved in the Kansas and Oklahoma proceedings. (App. pp. A12, A13). As noted by the court of appeals "the evidence in this regard, i.e., comparable sales, consisted of the same purchase contracts, with the exception of two, which this Court reviewed and found to be noncomparable in *Ashland I*." (App. p. A13). The court of appeals did not apply the facts of one action to those of another, but applied the law in one case to an action which had identical issues and very similar facts.

The decision of the court of appeals as to the calculation of the value of the helium is consistent with its prior holdings and is not inconsistent with any other court. The decision will only affect the petitioners herein. No unique application of law was considered or rendered.

The Court of Appeals Was Correct in Holding the Minimum Value of the Helium Was $2.00 per mcf

The court of appeals, in reversing the Kansas federal district court as to the issue of liability, held in *Grounds I* the Lessee-Producer Group was entitled to the reasonable value of the helium. Beginning with the liability phase both the Kansas federal district court and the Court of Appeals for the Tenth Circuit referred to evidence in the suits demonstrating the Helex Group and the United States Government were aware of the potential for being

required to make payments in the future to third parties. (App. pp. A142, A104, ¶40). The Helex Group and the Government acknowledged they were postponing the knotty legal problems of future payment. (App. pp. A9, A450-451, A142, A156-157).

The Helex Group demonstrated its awareness of the title question and possible future payments to the Lessee-Producer Group when they negotiated the contracts with the Government. It was in these negotiations that, ". . . in order to provide for possible future payments to lessees the companies insisted upon a helium payment of $2.00 per mcf for helium delivered." (App. pp. A15-16, A142 n. 2). The $2.00 was an amount in excess of any cost and rate of return and clearly reflected that both the Helex Group and the Government considered the value of the helium to be at least $2.00. (App. pp. A20-21). The evidence which supports the decision of the court of appeals demonstrates the Helex Group believed the value of the helium was substantially higher than the $2.00 and that they desired to have the Government pay an amount in excess of the $2.00 per mcf. (App. pp. A17-24). The Government, in an effort to limit its payments to the Helex Group to $2.00 per mcf, agreed to assume future liability to third parties in excess of the $3.00 per mcf. The court of appeals correctly found the provisos relating to sums beyond the $3.00 per mcf title liability exposure limit were inserted in the contracts for the benefit of third parties. "Clearly, there was no other reason for their insertion." (App. pp. A17-21). The evidence in these cases clearly supports the court of appeals' holding that "There is no room for doubt, in our view, that the contracting parties intended that third persons should receive the benefit of the $2.00 per mcf as the minimum entitlement." (App. p. A18).

In litigating the damage phase, the trial court was provided substantial evidence as to value of the helium,

but rejected the work-back method, holding it did not apply to raw materials. (App. pp. A13-14). Instead, since it did not find any comparable sales, the Kansas federal district court relied on the least appropriate evidence, i.e., expert testimony unrelated to objective facts. (App. p. A443). However, there was evidence before that court as to the minimum value of the helium. (App. pp. A17-18). Though the Lessee-Producer Group demonstrated, by use of the work-back method, the value of the helium was substantially above the $2.00, they also proved the helium had a minimum value of $2.00. On appeal, the court of appeals agreed. (App. p. A18).

The court of appeals did not, as asserted by the Helex Group, create a new contract between the Helex Group and the Government, but merely resolved the issue as to the minimum value of the helium. The contention of the Helex Group that the $2.00 value is not specified in the contracts between the Helex Group and the Government misconstrues the facts. The contracts between the Helex Group and the Government provided for a contract unit price stated in two parts. (App. p. A239). First, the cost of natural gas, which the evidence demonstrated was $2.00 per mcf. (App. pp. A239, A17-24). Second, a payment for the crude helium ranging from $10.30 to $11.78 per mcf. (App. p. A238). That $2.00 value is in excess of the cost of extraction and a reasonable rate of return. (App. p. A20). Moreover, the fact the contracts provided for indemnification for the Helex Group beyond $3.00 per mcf further indicates the value of the helium was in excess of $2.00. (App. p. A19). In response to the Helex Group's assertion that they are not bound by the $2.00 figure, the Court of Appeals for the Tenth Circuit held "These statements, in our view, do not address the issue: The parties [Helex Group and Government] did in contracting, recognize limits

of liabilities which were certain to arise at a future date and the parties negotiated those limits." (App. p. A22).

The court of appeals has found there was substantial evidence to support a conclusion the parties intended the minimum value of the helium was $2.00 per mcf. No constitutional issue is involved. Rather, the decision merely reflects the contractual provisions and intent of the parties. The decision would have no effect on others than these litigants.

The Court of Appeals Properly Applied the Decisions of This Court

The court of appeals was correct in applying the federal law as it pertains to the issue of prejudgment interest. Nothing in that application was inconsistent with this Court's opinion in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974). *Phillips* was solely concerned with federal court jurisdiction pursuant to 28 U.S.C. §1331(c), not whether federal or state law controls. (App. p. A449). Neither was the United States Government a party in *Phillips*. Presently, the Government is a party and the liabilities are primarily those of the Government, which require the uniform application of the law. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

Separate from the issues of jurisdiction, here based on the interpleader statute and prejudgment interest, the court of appeals applied various legal principles, resulting in adoption of the work-back method, a $2.00 minimum, and the lessors' entitlement to royalty based on their lease contracts. No inconsistency arose between those conclusions and the application of the law as decided by this Court.

The Court of Appeals and the District Court of Kansas Addressed the Issue of Royalty

The Kansas federal district court in the liability phase found the lessors were not entitled to royalty from the sale of the helium. (App. p. A170). Thereafter, the court of appeals reversed and held the Lessee-Producer Group was entitled to payment for the helium and was to pay the lessors pursuant to the leases, since the leases covered all components of the gas. (App. pp. A9-10, A153, A453, A454). On remand, the Kansas federal district court ignored the lease provisions regarding payment and apparently followed a confiscation-condemnation theory and divided the value of the helium equally. On appeal, the court of appeals, as a result of the consolidated hearing in which these lessors fully participated, again found the payment for the helium was to be pursuant to the lease contract terms, which is generally a one-eighth royalty. (App. pp. A453-454). Again, when the court of appeals provided the additional hearing in 1981, the lessors raised the issue. In all instances the courts addressing that point rejected the contention that the lessors were entitled to more than what was provided in the lease, which is almost universally a one-eighth royalty. (App. pp. A16-17). In doing so, each followed the contractual provisions of the leases.

More than a full and fair opportunity has been provided for the presentation of this issue. Due process has been complied with on several occasions. No constitutional issue is involved. The lease contracts govern and the court of appeals was correct on each occasion regarding its conclusions.

The Court of Appeals Did Not Violate the Due Process Provisions of the Constitution of the United States in Abating These Actions and Subsequently Terminating the En Banc Status

The procedure of the appellate court in initially holding this action in abated status was proper and logical. *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 5 (1963); *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960). (App. p. A4). Upon reviewing the position of all parties in the consolidated hearing, which included the petitioners, the court of appeals rendered its opinion resolving the legal issues as to the work-back method, limitation of royalty and entitlement to prejudgment interest. The principles of *stare decisis* and the law of the case applied to all parties as to those legal determinations. *Morrow v. Dillard,* 580 F.2d 1284, 1289 (5th Cir. 1978); 1B Moore's Federal Practice, ¶0.404[1] (2d ed.). The issue remanded to the Oklahoma federal district court was the starting point at which to begin the work-back process. Considering the similarity of contracts and contracting relationships, all of which were before the court of appeals in the consolidated hearing, that court held in abatement the Kansas actions for initial determination by the Oklahoma federal district court of the point at which the work-back method should begin. Judicial economy was accomplished by that procedural device. (App. p. A4). No party's due process rights were violated. Indeed, the court of appeals in its recent decision in these actions did not apply the facts of any other action, but merely the legal principles enunciated as a result of the consolidated hearing. Clearly, the abatement procedure was appropriate.

Similarly, the procedural device of terminating the *en banc* status was proper since the *en banc* court had previously heard all parties in the consolidated hearing

and rendered its *en banc* decision. A second *en banc* hearing was unnecessary. The discretion of the appellate court was properly exercised. *Western P.R. Corp. v. Western P.R. Co.*, 345 U.S. 247 (1953); *United States v. Martorano*, 620 F.2d 912 (1st Cir. 1980), cert. denied, 449 U.S. 952.

CONCLUSION

The decision of the court of appeals is clearly correct on all points. The questions raised pertain to legal issues and were resolved in accordance with the applicable law. The effect of the decision of the court of appeals is limited to the parties herein, and the holdings are not of a constitutional nature. Indeed, the holdings merely apply contract rules of law.

No compelling reason is presented by the petitioners to require this Court to review the complicated and extensive records in these cases, particularly considering the substantial history of review by various lower courts.

Respectfully submitted,

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May 18, 1982

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JOINT SUPPLEMENTAL APPENDIX A OF RESPONDENTS, MOBIL OIL CORPORATION, MAPCO PRODUCTION COMPANY, THE SUPERIOR OIL COMPANY AND DIAMOND SHAMROCK CORPORATION

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, the parents, subsidiaries and affiliates of respondents, Mobil Oil Corporation, Mapco Production Company, The Superior Oil Company and Diamond Shamrock Corporation, are set forth below:

MOBIL OIL CORPORATION:

Parent: MOBIL CORPORATION

Subsidiaries and affiliates:

Mobil Oil Aktiengesellschaft in Deutschland
Mobil Oil Angola, SARL
Mobil Oil Dahomey
Mobil Oil Del Peru (C.C.) S.A.
Mobil Oil Guinee S.A.R.L.
Mobil Oil Italiana Societa per Azioni
Mobil Oil Nigeria Limited
Mobil-TransOcean Company
Mobil Tyco Solar Energy Corporation
150 East 42nd Street Corporation
Abu Dhabi Petroleum Company Limited
Basrah Petroleum Company Limited
Brazos Heights Housing Incorporated
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Canyon Reef Carriers, Inc.

Erdoelraffinerie Gesellschaft mbH in Liquidation
Felix Oil Company
Kettleman North Dome Association
Near East Development Corporation
New Zealand Synthetic Fuels Corp. Ltd.
Osage Pipe Line Company
Seal Participants (Holdings) Limited
Texoma Pipe Line Company
Thums Long Beach Company
Twifo Oil Plantations Ltd.

MAPCO PRODUCTION COMPANY:

Parent: MAPCO, INC.

Subsidiaries and affiliates:

None

THE SUPERIOR OIL COMPANY:

Subsidiaries and affiliates:

McIntyre Mines Limited
Falconbridge Nickel Mines Limited
Western Platinum Limited
Madeleine Mines Limited
T. M. Duche NVT Company

DIAMOND SHAMROCK CORPORATION:

Subsidiaries and affiliates:

A.L.A. Chemicals Limited
Agil-Agroquimica Industrial Ltda.
Amalgamated Curacao Patents Company N.V.
Ancom Sdn. Berhad

Anglonor Limited
Anglonor S.A.
Arkwright Chemicals Limited
Carbocloro S.A. Industrias Quimicas
Chemby Chemicals Limited
DSAG Corporation
Dacral, S.A.
Dia Prosim GmbH
Diamond Shamrock (Africa) (Pty) Ltd.
Diamond Shamrock Alberta Gas Ltd.
Diamond Shamrock Hansen ApS
Diamond Shamrock (India) Ltd.
Diamond Shamrock Italia S. p. A.
Diamond Shamrock Polychem AB
Diamond Shamrock Scandinavia AB
Diamond Shamrock Scandinavia A/S
Diamond Shamrock Scandinavia OY
Diamond Shamrock Trading Corporation
Diaspa S. p. A.
Herbitecnica Defensivos Agricolas Ltda.
Inmuebles Industriales del Pacifico, S. A. de C. V.
Insecticidas del Pacífico S. A. de C. V.
Insulating Aggregates, Inc.
Korea Potassium Chemical Co., Ltd.
Lankro Italiana S. p. A.
MDS Corporation
Muenzing Chemie GmbH
Neopur Limited
Neopur Technologien G.m.b.H.
Nippon Dacro Shamrock Co., Ltd.
Nopco Argentino S.A.I.C. y F.

Nopco Columbiana S. A.
Nopco Industrial S. A. de C. V.
Parel Limited
Parel S. A.
San Nopco Limited
Semilera del Noroeste S. A. de C. V.
Showa Diamond Chemical K.K.
Sigmor Corporation
Sirotherm, Inc.
Thai Diamond Shamrock Co., Ltd.

Brief for the United States

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Nos. 81-1919, 81-1920, 81-1921 and 81-1922

In the Supreme Court of the United States

OCTOBER TERM, 1981

RALPH GROUNDS, ET AL., PETITIONERS
v.
MOBIL OIL CORPORATION, ET AL.

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL., PETITIONERS
v.
MOBIL OIL CORPORATION, ET AL.

NORTHERN NATURAL GAS COMPANY, ET AL., PETITIONERS
v.
MOBIL OIL CORPORATION, ET AL.

CITIES SERVICE GAS COMPANY, ET AL., PETITIONERS
v.
MOBIL OIL CORPORATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in using the proceedings in one case to determine the outcome of another case involving different facts and different parties.

2. Whether the court of appeals erred in adopting a theory of recovery not raised in the district court, on which no findings of fact were made.

3. Whether producer-sellers of natural gas containing helium are entitled to recover from their purchasers the reasonable value of the commingled helium in addition to the contract price for the natural gas.

4. Whether the court of appeals erred in applying federal common law rather than state law.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1919

RALPH GROUNDS, ET AL., PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

No. 81-1920

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL., PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

No. 81-1921

NORTHERN NATURAL GAS COMPANY, ET AL., PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

No. 81-1922

CITIES SERVICE GAS COMPANY, ET AL., PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. A1-A27)[1] is reported at 666 F. 2d 1279. The opinion of the district court

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[1]All references to "J.A." are to the joint appendix filed by the petitioners.

(J.A. A28-A132) is reported at 393 F. Supp. 949. The prior opinion of the court of appeals on the issue of liability (J.A. A133-A169) is reported at 441 F. 2d 704, cert. denied, 404 U.S. 951. The original opinion of the district court on the issue of liability (J.A. A170-A301) is reported at 292 F. Supp. 619.

JURISDICTION

The judgment of the court of appeals (J.A. A511-A512) was entered on November 16, 1981. A timely petition for rehearing was denied on January 19, 1982 (J.A. A512-A513). Petitions for a writ of certiorari were filed by Northern Natural Gas Company, Cities Services Gas Company, Panhandle Eastern Pipe Line Company, and Ralph Grounds on April 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Natural gas produced from the Hugoton gas area in the southwestern United States contains approximately 99% of the nation's recoverable supply of helium (J.A. A8). In order to conserve this valuable resource, which would otherwise be lost in the refining and burning of the natural gas, Congress enacted the Helium Act Amendments of 1960, 50 U.S.C. 167 *et seq.* Pursuant to this statutory authorization, the federal government contracted with various natural gas refining companies (the Helex Companies) for the extraction and purchase of helium.

The contract price for the extracted helium was based upon government estimates of the costs it would incur were it to build and operate the helium extraction plants. Because of the perceived urgency in initiating the helium conservation program, the United States did not undertake extensive title checks to determine what interests, if any, respective landowners and lessee-producers might have in the commingled helium (J.A. A9). An internal government

memorandum written during the contract negotiations with the Helex Companies, however, shows that one component of the contract price was a $2.00 payment for each thousand cubic feet (mcf) of extracted helium to compensate the companies for any costs incurred in obtaining title to the helium.[2] The government further agreed to indemnify the Helex Companies for any amount over approximately $3.00 per mcf that might subsequently be spent to obtain title to the commingled helium.

Each Helex Company purchased the helium-bearing gas it processed from its parent pipeline company, which in turn purchased the gas from many lessee-producers. The price of the natural gas sold by the lessee-producers was regulated by the Federal Power Commission (FPC) under the Natural Gas Act, 15 U.S.C. 717 *et seq.* No additional sum above the FPC regulated price was paid to the lessee-producers by the Helex Companies for the helium component of the gas stream. After the Helex Companies began extracting helium for sale to the United States, the lessee-producers' lessors (the landowners) brought several suits in state court claiming ownership of the helium. Three of the four Helex Companies and their parent pipeline companies responded by bringing this interpleader action in the United States District Court for the District of Kansas to determine the rights of the landowners and lessee-producers to the proceeds of the helium extraction contracts.

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[2]This $2.00 figure was derived from a 1958 helium extraction contract between the United States and the Colorado Interstate Gas Company, referred to as the "Keyes contract." Prior to the Keyes contract, the price for extracted helium generally had been based solely on the shrinkage in the volume of the natural gas stream resulting from the removal of the helium. The Keyes contract, however, included a $.04 per mcf "processing fee" in addition to the shrinkage payment. Because the gas sold under the Keyes contract had a helium content of 2%, 50 mcf of gas had to be processed to obtain one mcf of helium. Thus, the "processing fee" for one mcf of extracted helium under the contract was $2.00.

2. At the first trial of this case, the district court held that the FPC-regulated price for a natural gas stream was controlling and neither the lessee-producers nor the landowners were entitled to additional compensation for the helium contained in their natural gas (J.A. A170-A301). The court of appeals reversed. It held that the lessee-producers were entitled to recover the reasonable value of the helium contained in the natural gas delivered to the Helex Companies, and the landowners were in turn entitled to appropriate royalties on such value (J.A. A133-A169). The case was remanded to the district court for further proceedings to determine the reasonable value of the helium. The United States intervened in the litigation because of its potential liability under the indemnification clause of its contracts with the Helex Companies.

3. On remand, the district court found that the reasonable value of the commingled helium ranged from $.60 to $.70 per mcf (J.A. A123). In setting this value, the court chiefly relied on expert witness analysis of certain comparable sales of helium-bearing gas (J.A. A104-A105). The court specifically rejected use of the "work back" method of valuation proposed by the lessee-producers, whereby the market value of refined helium is reduced by the costs of processing to arrive at the value of the commingled helium (J.A. A98-A102).

4. Between the 1971 decision of the court of appeals in this case and the district court decision in 1974 on remand, the fourth Helex Company, Phillips, was sued in the United States District Court for the Northern District of Oklahoma by its lessee-producer, Ashland, for the reasonable value of the commingled helium extracted by it. *Ashland Oil, Inc.* v. *Phillips Petroleum Co.* (*Ashland I*), 364 F. Supp. 6 (N.D. Okla. 1973), aff'd in part, 554 F. 2d 381 (10th Cir. 1975), cert. denied, 434 U.S. 921, 968 (1977), on remand, 463 F. Supp. 619 (1978) (*Ashland II*), aff'd, 607

F. 2d 335 (10th Cir. 1979), cert. denied, 446 U.S. 936 (1980). The United States intervened and was aligned as a party defendant. The district court in *Ashland I*, utilizing the work-back method rejected by the district court in this case, set the reasonable value for commingled helium at $11.76 to $16.98 per mcf.

The district court judgment in *Ashland I* and the judgment on remand in this case were appealed to the court of appeals. The court ordered the two cases consolidated for briefing and en banc consideration in 1976. In 1977, the court issued an en banc opinion dealing only with *Ashland I*, specifically reserving decision in this case. *Ashland Oil, Inc.* v. *Phillips Petroleum Co.* (*Ashland I*), 554 F. 2d 381, 384-385 (10th Cir. 1975), cert. denied, 434 U.S. 921, 968 (1977) (J.A. A429-A467). For nearly five years following the issuance of *Ashland I*, this litigation remained in what the court of appeals has since called "abated status" (J.A. A331).

5. In the en banc *Ashland I* opinion the court of appeals approved the use of the work-back valuation method because, in its view, no free market for commingled helium existed. The court held that the comparable sales offered by Phillips and the United States were not comparable, either because they were sales to the government at a time when the government had a monopoly on helium extraction, or because the contracts did not specifically provide for the processing of helium (J.A. A440-A443). The district court's use of the work-back method, however, was held to be deficient in a few particulars. The case was remanded for the district court to re-examine certain elements of the work-back formula, including the starting value, the return on investment, and the expense allocable to production of hydrocarbons (J.A. A445-A448). On remand, the district court used revised work-back calculations to set the value of

commingled helium at $3.00 per mcf.[3] *Ashland Oil, Inc.* v. *Phillips Petroleum Co.* (*Ashland I*), 463 F. Supp. 619 (N.D. Okla. 1978) (J.A. A390-A428). The court of appeals affirmed, except for the district court's denial of prejudgment interest. *Ashland Oil, Inc.* v. *Phillips Petroleum Co.* (*Ashland II*), 607 F. 2d 335 (10th Cir. 1979), cert. denied, 446 U.S. 936 (1980) (J.A. A385-A389).

6. As stated above, the appeal in the present case remained undecided for almost five years while the *Ashland* litigation continued. Finally, in May 1981, the court of appeals, sua sponte, removed this case from what it described as "abated status," terminated its en banc status, and assigned it to a three-judge panel for oral argument (J.A. A330-A331). That panel held that the district court erred in 1974 in rejecting the work-back method of valuation because work-back was "the law of the case" as a result of the 1977 en banc decision in *Ashland I* (J.A. A12-A14). The court of appeals further held that $2.00 per mcf is the minimum payment the lessee-producers are entitled to receive under the work-back method of valuation because this payment, in the court's view, was considered by both the Helex Companies and the United States to be the minimum amount that the Helex Companies might owe to third parties if a lawsuit arose over title to the helium (J.A. A18-A21). The court additionally held that the district court did not abuse its discretion in awarding prejudgment interest (J.A. A24-A26).

The court also offered this belated explanation of why the appeal in this case had been "abated" for nearly five years (J.A. A4):

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[3]The $3.00 per mcf figure was adopted by the district court as an average reasonable value for the commingled helium (J.A. A428). The court found that the actual value of the commingled helium ranged from a low of minus $.40 per mcf to a high of $5.34 per mcf (J.A. A427).

The practical consideration for the use of the abatement procedure was to employ only one district court initially for a redetermination of the helium valuation pursuant to the specific guidelines, directions and instructions contained in *Ashland I*. It was believed that further Oklahoma district court proceedings would serve to resolve the valuation issue in the related cases.

DISCUSSION

1. The three Helex petitioners (81-1921 Pet. 12-14; 81-1922 Pet. 15-16; 81-1920 Pet. 20-22) understandably protest the court of appeals' use of the *Ashland II* litigation to settle the valuation dispute in this case, which involves different gas streams and different parties, and in which much more comprehensive evidence of valuation was presented. The concerns raised by petitioners regarding the propriety of the court of appeals' unannounced use of an "abatement" procedure are not frivolous, in light of fundamental notions of notice and fair play.[4] But, while petitioners were undoubtedly disadvantaged by the court of appeals' unusual handling of this case, the court's abatement procedure did not prejudice the interests of the United States because the United States was a party in both the present case and *Ashland II*. Objections to the procedure, therefore, cannot appropriately be raised by the United States before this Court.

2. Petitioners contend (81-1921 Pet. 14-18; 81-1922 Pet. 19-20; 81-1920 Pet. 16-18) that the court of appeals erred in holding that the $2.00 helium cost component of the

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[4]At a minimum, the court of appeals' undisclosed intention to use the *Ashland II* litigation to settle the valuation questions in this case deprived petitioners of the opportunity to construe the "guidelines, directions and instructions" (J.A. A4) contained in *Ashland I* before a district court, even though the court of appeals acknowledged that those guidelines needed further refinement (*ibid.*). See 81-1922 Pet. 16-17.

contract between the United States and the Helex Companies was intended to benefit the lessee-producers under a third-party beneficiary contract theory. There is some weight to petitioners' contentions.

A valid third-party beneficiary contract hinges upon the intent of both contracting parties to confer a benefit upon the third party, and this intent must be clear from the express provisions of the contract. See, e.g., *Jett* v. *Phillips & Associates*, 439 F. 2d 987 (10th Cir. 1971). Here, however, because a third-party beneficiary contract theory was not raised before the district court, there is little evidence in the record to show that either the Helex Companies or the government specifically included the $2.00 helium cost component in the contract for the benefit of the lessee-producers or the landowners.[5] Had the Helex Companies and the government known that this theory would be raised on appeal, evidence of the parties' intent in including the $2.00 in the contract price could have been presented before the district court.[6]

Notwithstanding the probable error of the court of appeals, the United States does not believe this issue warrants consideration by this Court. The court below did not

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[5]The $2.00 figure, moreover, was not set out in the contract, but appears only in internal government memoranda.

[6]The court of appeals recognized that the district court "did not directly address the legal significance of the $2.00 per mcf payment," but noted that the district court did discuss the $3.00 indemnity provision (J.A. A18-A19). The district court's discussion of the $3.00 indemnity clause, however, had nothing to do with the court of appeals' new theory that the $2.00 payment was the product of a third-party beneficiary contract. The $3.00 limit on Helex liability was an express term in the contract, and was clearly an indemnity agreement. The $2.00 figure did not ever appear as a separate figure in the contract. Further, it was not a promise to indemnify the Helex Companies up to $2.00; it was a payment of $2.00 to the Helex Companies, whether they incurred liability on the helium or not.

state any novel proposition of contract law, or misconstrue a rule of law having widespread significance. The court below merely found "in the light of all surrounding circumstances" that the parties to this contract intended to benefit the lessee-producers and landowners by including a helium cost component in the contract price for extracted helium (J.A. A18). While this is an erroneous factual conclusion, it does not present a question requiring the attention of this Court.

3. The United States adheres to its view that the court of appeals erred in concluding that lessee-producers and landowners are entitled to additional compensation for the helium component of the natural gas stream sold to the Helex Companies. The Helex Companies, under their gas contracts, acquired the entire gas stream from the lessee-producers, and could either extract or ignore the helium component of that stream without incurring additional contractual obligations. The Court, however, has denied petitions for a writ of certiorari presenting this issue on three previous occasions. 404 U.S. 951; 434 U.S. 921, 968; 446 U.S. 936. In the absence of unusual circumstances, we decline to press the issue once more upon the Court.[7]

4. Petitioners contend (81-1921 Pet. 19; 81-1922 Pet. 22-24; 81-1920 Pet. 9-16; 81-1919 Pet. 16-19) that the court of appeals erred in applying federal common law to various issues in this case, rather than state law as indicated by

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[7]Panhandle Eastern contends (81-1920 Pet. 13-16) that the court of appeals erred in affirming the district court's determination that it was liable for the value of helium received under six natural gas contracts in which the helium content of the gas was specifically mentioned (J.A. A111-A113). The district court's treatment of these six contracts, however, inextricably relies upon the court of appeals' original rationale for finding the Helex Companies liable for the reasonable value of the helium component of the gas stream. As stated above, the Court has repeatedly denied petitions for a writ of certiorari presenting this basic liability issue.

Phillips Petroleum Co. v. *Texaco, Inc.*, 415 U.S. 125 (1974). Northern Natural Gas and Cities Service Gas both assert that the court of appeals erroneously applied the rule of *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), in approving an award of prejudgment interest under federal common law. Panhandle Eastern and Grounds both argue that the court of appeals ignored the holding in *Phillips Petroleum Co.* v. *Texaco, Inc., supra*, by failing to treat this case as an action in quantum meruit under Kansas state law. According to these petitioners, application of state law would alter the result reached by the court below. For example, Kansas state law appears not to allow prejudgment interest in the circumstances of this case (see *Lightcap* v. *Mobil Oil Corp.*, 221 Kan. 448, 465-467, 562 P.2d 1, 14-15 (1977)), and landowners suing in quantum meruit under Kansas law apparently would be entitled to a greater royalty percentage than the one found in the landowners' leases with the lessee-producers (81-1919 Pet. 16-19).

The Court did hold in *Phillips Petroleum Co.* v. *Texaco, Inc., supra*, that suits to recover the reasonable value of helium are, "in effect, * * * action[s] in *quantum meruit*, whose source is state law and not federal law." 415 U.S. at 129. Thus, suits similar to the one at issue here do not "arise[] under the Constitution, laws, or treaties of the United States" for the purpose of federal subject matter jurisdiction under 28 U.S.C. 1331(a). The argument can be made, therefore, that state and not federal law governs all the rights and liabilities of the parties to this litigation.

Notwithstanding the above, however, it is not entirely clear that the court of appeals erred in applying federal law to construe the contracts at issue in this litigation. Here, unlike in *Phillips Petroleum Co.* v. *Texaco, supra*, federal subject matter jurisdiction is clear. This litigation is properly in federal court under the provisions of 28 U.S.C. 1335,

the federal interpleader statute. Furthermore, the pervasive influence of federal law in the context of this litigation undercuts petitioners' resort to state law. The helium extraction contracts at issue in this litigation were authorized by and executed under express provisions of federal law. 50 U.S.C. 167 *et seq.* Finally, the United States does have substantial potential liability under the indemnity clause of its contracts with the Helex Companies should the reasonable value of commingled helium be found to exceed $3.00 per mcf. The fact that this potential federal liability hinges upon the legal rights of claimants in more than one state (Kansas and Oklahoma) would appear to justify the court of appeals' application of a uniform federal rule to the issues in this case. Where application of state law could "lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states," this Court has stated that the "desirability of a uniform rule is plain." *Clearfield Trust Co.* v. *United States, supra*, 318 U.S. at 367. Thus, the application of federal common law to this litigation is not an issue that ineluctably requires review by this Court.

CONCLUSION

The United States does not oppose the petitions.

Respectfully submitted.

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No. 81-1919

In the Supreme Court of the United States

October Term, 1981

RALPH GROUNDS, ET AL. (Landowners Group),
Petitioners,

vs.

MOBIL OIL CORPORATION, ET AL.
(Lessee-Producer Group),

AND

NORTHERN NATURAL GAS COMPANY, ET AL.
(Helex Group),

AND

UNITED STATES OF AMERICA, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN RESPONSE TO BRIEFS IN OPPOSITION AND TO MEMORANDUM FOR THE UNITED STATES

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STATEMENT

This short reply brief is addressed to arguments newly raised in the three briefs in opposition, filed by Respondents Gulf Oil Corporation, Mobil Oil Corporation, et al., and Amoco Production Company, et al.

The position of these three groups of oil companies is largely summarized in Gulf's attempt to formulate a single "Question Presented" at page (i) of its brief. It is now suggested there that petitioners are asking this Court to overrule "two decisions" of the Court below, the 1971 decision referred to as *Grounds I* (J.A., p. A136) and the 1977 decision referred to as *Ashland I* (J.A., p. A429).[1]

The views of the oil companies as to the applicability of *Grounds I* on the royalty accounting issue are basically the same. Mobil, et al., merely claim that a determination of the royalty accounting issue was "implicit" in the Court's holding that helium was embraced within the granting clauses of the leases (Brief in Opposition, p. 8). Amoco, et al., state that the 1/8th usual royalty was "obviously applicable" merely because the granting clauses of the leases embraced helium (Brief in Opposition, pp. 5-6). Gulf also admits that the holding of the Court was limited to the "grant of gas" in the leases and that the Court in *Grounds I* held that the lessees were required to pay royalty on the reasonable helium value to the landowners, without in any way specifying the extent or manner of accounting for such royalty (Brief in Opposition, p. 1).

These major oil companies continue to refuse, as they did below, even to discuss the merits of landowners' claims in the apparent hope that this Court will overlook them or

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1. If the "Questions Presented" in the Brief in Opposition of Mobil, et al., are really intended to be applicable to the instant petition (as distinguished from the petitions in 81-1919, 81-1920 and 81-1921 to which they are appropriately addressed), it is asserted (Question 1) that the royalty accounting issue was resolved in *Grounds I*. Similarly, if the "Questions Presented" by Amoco, et al., can possibly be construed as addressed to the instant case, rather than exclusively to the petitions in 81-1920, 81-1921 and 81-1922 (as to which they are appropriate), it is asserted that (Question 1) the royalty accounting issue was finally decided in *Grounds I*.

will confuse them with the issues sought to be presented by the helex groups in their separate petitions.

The lack of conviction of the oil companies thus revealed is transformed into an outright confession of error below when discussed by a pipeline company that happens also to be the owner of a large block of oil and gas leases and is thus similarly affected by the royalty accounting issue.

Panhandle, as an oil and gas lessee also directed to account to landowners for royalty, has admitted in this case that the Court of Appeals below has told landowners that the royalty accounting matter "has been decided *in absentia*, in a case in which no royalty or landowner group was present or represented" and that they "should have their day in court on a matter of great importance to them." (Brief in Support of Petition for Writ of Certiorari, p. 3).

The United States admits that at such day in court at the appellate level, application of state law would alter the result reached by the Court below and that landowners, asserting quantum meruit claims under state law, would apparently be "entitled to a greater royalty percentage . . .," such as that determined by the trial court (Memorandum for the United States, p. 10).

ARGUMENT

1. Grounds I Was Not and Could Not Have Been a Decision on the Royalty Accounting Issue.

We will not repeat here the landowners' review of the issues as presented to the Court of Appeals in *Grounds I* and the careful explanation of why royalty accounting was not justiciable in that case and first became justiciable in *Grounds II*, as to which review is first available and now sought herein (81-1919 Pet. 6-9, 19-23). Respondents do not take any issue with that detailed analysis. Rather, they make the same unwarranted (and unstated) assumption, as did the court below in *Ashland I* and again in *Grounds II*, here for review, that, in *Grounds I* the court could somehow reach out and dispose of an accounting issue never considered by the trial court nor ever embodied in an order from which an appeal could be taken. We have also (81-1919 Pet. 22) pointed out the constitutional infirmities of such procedures and will not repeat them here. The issues present and presented are a matter of undisputed record and cannot be and are not denied.

The oil companies now admit that the case had been divided from the beginning into two phases, a liability and a damages (or accounting) phase (See Gulf Brief in Opposition, 1-2). The trial court held that the helex groups had no liability and no duty to account. The trial aspects as to liability were completed, with no accounting of any kind ordered or found due. On appeal, resulting in the decision in *Grounds I*, the court reversed and found that both landowners and their oil and gas lessees were entitled to an accounting out of the fund consisting of the money paid and to be paid by the United States to the interpleading

helex groups. It is also admitted by the oil companies that this *Grounds I* decision ended the liability phase of the case (See, for example, Gulf Brief in Opposition, 1-2). This left for determination by the trial court on remand the accounting due to the landowners and to their oil and gas lessees, including valuation of the helium to be paid from the fund and of the royalty due landowners "thereon."

The pretrial order describes this second phase of the trial as "the accounting phase of these actions" (J.A., A362, A363), with the issues to be decided in the "accounting phase" being "A. Reasonable value of helium" and "B. Allocation of the Fund," with a subhead under "B" as to the proper basis for computing the amount of royalty due to the landowner (J.A., A363-A364). Now, after the later, extraordinary performance of the Court of Appeals in trying the landowners *in absentia* in *Ashland I* (discussed below), the oil companies claim that the second phase of the bifurcated proceedings was a "valuation" phase limited to the valuation of helium only, rather than embracing a complete valuation and accounting of both helium and royalty, as properly tried and determined under the pretrial order in the district court.

Under these circumstances, there was and could have been no decision in *Grounds I* on royalty valuation and landowners do not, as argued by Respondents, here seek to overrule a decision in *Grounds I*. Rather, they are here to assure proper implementation of the required accounting out of the fund in accordance with applicable state law principles of quasi-contract wholly consistent with what the Court did actually decide in *Grounds I*.

2. Ashland I Was Not and Could Not Have Been a Decision As to the Royalty Accounting Issue.

In their petition the landowners reviewed with care the circumstances surrounding the court's discussion of oil and gas lease royalty provisions in *Ashland I* (81-1919 Pet. 9-12, 19-23), pointing out that no landowners were ever parties to that appeal or to any *Ashland* proceedings and that all parties to that case (which was not a class suit and did not involve an interpleader fund) agreed that it was beyond the power of the Court to determine any issues regarding obligation of the oil and gas lessee to its lessors. Here again, the Respondents do not take issue with that analysis nor do they discuss in any way the constitutional inhibitions that prevented the Court in *Ashland* from having power to adjudicate a royalty accounting issue in the absence of a case or controversy between the lessor and lessee (81-1919 Pet. 20-21). In the absence of that power, *Ashland I* cannot be a decision on the royalty accounting issue, in an interpleader case or otherwise, and landowners do not, as argued by Respondents, seek to overrule *Ashland I*. What was said in *Ashland I* about royalty, as pointed out in our Brief in Opposition in Nos. 81-1920, 81-1921, 81-1922 (pp. 5-6), makes law-of-the-case, *stare decisis, res adjudicata*, or any other rule of finality of judgment or judicial repose wholly inapplicable to avoid Article III and Fifth Amendment due process requirements relied upon by the Landowner Group. The extent to which the lessee must account for royalty out of interpleaded funds under the law of quasi-contract is a question of fact to be determined from all of the evidence relating to that question. Evidence on that issue was examined by the trial court and determined by it for the first time in these Kansas cases, and then

only necessarily on the remand resulting in *Grounds II*, here for review. On such remand, evidentiary record on such factual issue was made in the trial court by adverse litigants presenting an honest and antagonistic assertion of rights. We know of no authority which says that an afforded *amicus* presentation can create finality or judicial repose as to an issue as to which there was no evidence presented through adversary proceedings at the trial level and where the necessary parties to such adversary proceedings were never present at any time, either at the trial or appellate level, preventing any possible review proceedings in this Court of the *Ashland I* supposed royalty "decision." It is here, for the first time, that an opportunity is afforded for review relating to the royalty accounting issue.

3. The Law Applicable to Oil and Gas Leases Was Not Applied by the Appellate Court Below.

Gulf says (Brief in Opposition, p. 4) that state law was properly applied by the Court below to the royalty accounting issue. Mobil, et al., state (Brief in Opposition, p. 19) that the trial court "apparently" followed a confiscation-condemnation theory and divided the helium equally, but is unable to suggest any justifiable basis for the failure of the Court of Appeals to review the trial court's findings and conclusions and the undisputable evidence supporting the same. Amoco, et al., claim (Brief in Opposition, pp. 5-6) that landowners seek to avoid the royalty provisions of the leases related to intended production and state that Petitioners cite no authority which supports their position.

Contrary to these contentions, landowners have in their Petition (pp. 7-9, 16-19) set forth the findings and

conclusions of the trial court, as well as authorities demonstrating that the trial court correctly decided the issue under the state law of quasi-contract governing the same and not on any "confiscation-condemnation" theory. In their Supplemental Brief of Petitioners in Response to Brief of Panhandle Eastern Pipe Line Company and National Helium Corporation in Support of Petition for Writ of Certiorari (pp. 3-6), landowners have set forth additional authority in support of the trial court's findings, conclusion and judgment on the royalty accounting issue. These same authorities all demonstrate beyond cavil that the Court below failed to follow this Court's decision in *Phillips Petroleum Company v. Texaco, Inc.*, 415 U.S. 125 (1974) holding that state law governed the disposition of the quasi-contract royalty accounting issue. The oil companies simply ignore these authorities completely.

4. It Is Not Proper to Paint the Petition in the Instant Proceeding (No. 81-1919) and the Petitions in Nos. 81-1920, 81-1921, and 81-1922 With the Same Broad Brush.

As the Landowner Group has pointed out in their Brief in Opposition in Nos. 81-1920, 81-1921, and 81-1922 (pp. 2-6), the helex petitioners there dwell on procedural matters related to the claims of landowners in the instant proceedings in order to highlight and furnish a sympathetic background for their own arguments dealing with the relationship of this *Grounds* case to the separate *Ashland* case. The same emphasis is present in Panhandle's Brief In Support of the Petition of the Landowner Group in this case (See pp. 2-3, 5). And now the oil companies, except Gulf, file single documents as briefs in opposition to all four petitions, using, for the most part, a shot-gun ap-

proach which does not distinguish between the landowners' petition and the petitions of the Helex Group and make it appear that there is no real distinction between them.

5. Comments on Memorandum for the United States.

The United States does not oppose this Petition. It suggests, however, in another shot-gun approach, that application of a uniform (federal common law) to this litigation is not an issue that ineluctably requires review by this Court (Memorandum for the United States, pp. 10-11). It has failed to recognize a fundamental difference between these petitioning landowners' claims and those of the Helex Group. Because of the potential liability of the United States, the invocation of a "federal common law" may arguably be appropriate in determining the liability of the Helex Group. Once that liability is established, however, it is a matter of little concern to the government how the helium fund is subsequently allocated between the oil companies and these petitioning landowners. The invocation by the Court below of a new "federal common law", which directly conflicts with uniform applicable state common law followed by the trial court in its findings, is, therefore, not an appropriate method to dispose of the landowners' claims. *Texas Industries, Inc. v. Ratcliff Materials, Inc.*, 451 U.S. 630 (1981). Apparently, because of this lack of interest, the United States views with equinimity the fundamental and gross constitutional errors made by the Court below, which have resulted in the attempted transfer of millions of dollars by the Court below from these petitioning landowners to their oil and gas lessees.

CONCLUSION

We end by pointing out that only the rights of landowners were sacrificed by the unprecedented procedures of the court below. We feel confident that such unprecedented and unconstitutional transfer of millions of dollars from farmers to oil companies will not escape the exercise by this Court of its supervisory powers.

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